90-1647

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1990

*IN RE:* STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

*Petitioner*

**Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana**

## PETITION FOR WRIT OF MANDAMUS

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

23 April, 1991

PAUL R. BAIER
Special Assistant
Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
*Attorneys for the State of Louisiana*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether mandamus should issue from this Court to remedy the district court's violation of State sovereignty by its refusal to remand *State of Louisiana, ex rel. Guste, Attorney General v. Roemer, Governor of Louisiana* to State court and by its order depriving Louisiana of its constitutional form of government and Attorney General Guste of his constitutional office.

## LIST OF PARTIES

State of Louisiana, *ex rel.* William J. Guste, Jr., Attorney General; William J. Guste, Jr., in his official capacity as Attorney General of Louisiana; Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana; Honorable Charles E. "Buddy" Roemer, III, Governor of Louisiana; John N. Kennedy, Joseph N. Levin, Jr., and Carla Calobrisi, Esqs., Attorneys for Governor Roemer.

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William J. Guste, Jr., Attorney General of Louisiana, respectfully prays, pursuant to 28 U.S.C. §1651 and Rule 20, that a writ of mandamus issue to the Honorable Charles Schwartz, Jr., United States District Judge for the Eastern District of Louisiana, directing him to vacate the Judgment issued on the merits of Civil Action No. 90-4109, *State of Louisiana, ex rel. William J. Guste, Jr., Attorney General, Plaintiff v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph N. Levin, Jr., and Carla Calobrisi, Defendants,* lately pending in state court but removed to federal court by defendants therein, and to remand the cause to the Civil District Court for the Parish of Orleans, Louisiana, whence it came.

Attorney General Guste's state court petition raises questions arising exclusively under the State Constitution and laws, *viz.*: who is the State's legal representative in court – the Attorney General or the Governor? This Court has wisely left such internal disputes in the hands of state judges, where they belong. *Massachusetts v. Feeney,* 429 U.S. 66, 67 (1976) (certifying to the Massachusetts Supreme Judicial Court the question whether the Attorney General may prosecute an appeal over the objections of the Governor). This vital question of allocation of State sovereignty was before this Court in No. A-127, Oct. Term 1989, *State of Louisiana, ex rel. Guste v. United States,* which was Attorney General Guste's application for a stay of the district court's remedial orders in the Louisiana higher education desegregation case. Governor Roemer opposed the Attorney General's application for a stay, telling this Court: "[T]he Governor, as Louisiana's chief executive officer, has the constitutional authority and responsibility to determine the position and policy of the State in this litigation and all other to which the State is a party or in which the State has an interest." Motion to Dismiss Appeal of William J. Guste, Jr., No. 89-556, Oct. Term 1989, pp. 13-14. The Governor's counsel wrongly accused Attorney General Guste of making "false representations to this Court . . . ris[ing] to the level of 'conduct unbecoming a member of this Court' . . . . " *Id.*, p. 19. Not only did the Governor's counsel misquote Supreme Court Rule 8 ("conduct unbecoming a member *of the Bar* of this Court"), but Your Honors granted General Guste's application for a stay on August 18, 1989.

The district court below has stripped Louisiana's Attorney General of his constitutional office; worse yet, it has restructured Louisiana's constitutional form of government in violation of the language and history of Louisiana's Constitution of 1974 and a century of Louisiana Supreme Court decisions holding that the Attorney General is the exclusive legal representative of the State. Such extraordinary intrusion into Louisiana's sovereignty imperatively calls for application of "the exceptional rule" of mandamus here, *Ex parte Harding,* 219 U.S. 363, 379 (1911) (per White, C.J.), to control the district court's lawless usurpation of the role of state courts in our federal system. *Accord, Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d 1 (1st Cir. 1984), *stay of mandamus denied by the full Court sub. nom. Barcelo, Governor of Puerto Rico v. Hernandez Agosto, President of the Puerto Rico Senate,* 469 U.S. 927 (1984).

Moreover, the district court has resolved the dispute between Attorney General Guste and Governor Roemer in flagrant disregard of the strict rules governing removal jurisdiction and "the considerations of comity between state and federal courts" which Your Honors have said warrant mandamus here. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 31 (1943), citing *Maryland v. Soper (No. 1),* 270 U.S. 9, 29 (1926).

The cloud cast over Attorney General Guste's authority to defend Louisiana's higher education system in federal court must be removed immediately. Otherwise Louisiana will continue to speak with two voices in an agonizing field which Your Honors have recently agreed to review in the Mississippi case.[1]

## I. ORDER AND OPINION BELOW

On October 30, 1990, the U.S. District Court below entered, in consolidated cases Nos. 80-3300 and 90-4109 on the docket of the United States District Court for the Eastern District of Louisiana, an "Opinion and Order on the Representation of the State" and a "Judgment" pursuant to such Opinion and Order. App., pp. 2a-30a. The Judgment as to case No. 90-4109 ordered "that the

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[1] *Ayers v. Mabus,* No. 90-6588; *United States v. Mabus,* 90-1205 (consolidated and *cert. granted* April 15, 1991).

petition of William J. Guste for declaratory judgment (Civil Action No. 90-4109) is DENIED on the merits at his cost" and as to case No. 80-3300 ordered, in pertinent part, "that John N. Kennedy and Joseph J. Levin Jr. are designated as sole trial counsel representing the State of Louisiana in Civil Action No. 80-3300 and that William J. Guste, Attorney General, is authorized to appear in Civil Action No. 80-3300 solely as an amicus curiae."

On November 28, 1990, the Fifth Circuit, without giving reasons, denied a virtually identical petition for writ of mandamus as sought herein from this Court. App., p. 1a.

In a separate judgment also entered on October 30, 1990, the district court reversed its previous judgment on the merits of liability in Civil Action No. 80-3300 and, finding no violations in Louisiana's higher education system, entered final judgment in favor of defendants and against complainant U.S.A. App., p. 31a.

## II. JURISDICTION

Jurisdiction to grant the writ of mandamus sought by petitioner is conferred on this Court by 28 U.S.C. §1651 in aid of its jurisdiction pursuant to 28 U.S.C. §1254.

## III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Construed and interpreted, explicitly or implicitly, were Art. IV of the Louisiana Constitution (1974); Louisiana Revised Statutes, Title 13, Section 5036 (La. R.S. 13:5036); La. R.S. 49:257(B), enacted in 1988 (Act 448); and Act 21 of the Second Session of 1872. Also bearing upon the issues herein are Art. VIII, §§5, 6, 7 and 8; Art. XIII, §§1 and 2; and Art. XIV, §18, of the Louisiana Constitution (1974). These provisions are set forth *verbatim* in App., pp. 36a-46a.

## IV. BACKGROUND AND SUMMARY OF ARGUMENT

The focus of the controversy is whether the State of Louisiana, by its Constitution, has allocated to its Attorney General or to its Governor the internal sovereign, governmental power to be the State's lawyer and to control the advocacy of the State when sued in litigation as a separate party in its own name. Respondents Kennedy, Levin, and Calobrisi ("Governor's counsel") in Civil

Action No. 80-3300, *U.S.A. v. La.*, were the initiators and chief proponents of the abolition of pertinent provisions of Louisiana's own State Constitution – an invalidation not sought by complainant U.S.A., not within the scope of liability found on summary judgment, and beyond the pleadings' theory of the case. General Guste, on the other hand, seeks to protect Louisiana's constitutional and statutory provisions against destruction by federal judicial decree.[2] Louisiana has a right to a good faith legal defense from its Attorney General, not from counsel who advocate the Governor's irreconcilable political agenda as his proffered policy for the State.

When the Attorney General sought a definitive resolution of these State law issues in State court, Governor Roemer removed the State court action to Federal court where it became Civil Action No. 90-4109 and was consolidated with 80-3300. Citing no need to follow this Court's pronouncements and teachings on comity abstention and certification to State court of State attorney representation questions, the district court proceeded to decide these issues itself, even though the State court suit sought to resolve these State law issues for a number of situations wherein it has recently arisen, not merely for *U.S.A. v. Louisiana* alone.

The district court repudiated the Opinion of Justice Rehnquist explaining the significance of this Court's denial of a stay in *Graddick v. Newman*, 453 U.S. 928, 937 (1981), and, having reinterpreted that case in opposition to Justice Rehnquist's explanation, applied it as Federal authority for depriving the Attorney General of the proper constitutional powers of his State office and for bestowing upon Governor's counsel purported State constitutional powers actually denied to them by Louisiana's Constitution. Casting ethical aspersions upon General Guste, the district court disqualified the Attorney General from representing the State on the grounds of his alleged inactivity during the remedy-fashioning portion of the bifurcated proceedings, even though:

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[2] The Attorney General has no objection to the Governor appearing as amicus curiae to express his views in support of the district court's judgment on remedy. See *United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988). In fact, the Attorney General proposed such a procedure in a spirit of compromise by letters to Governor Roemer dated Sept. 29, Dec. 21, 1989 (App., pp. 50a-52a), and in a personal meeting with the Governor.

(1) The Attorney General and his staff were original counsel for the State of Louisiana and represented it as *sole* counsel from the outset of the litigation on March 14, 1974, through the initial pleadings, discovery, negotiation and implementation of the Consent Decree, trial on liability *via* cross motions for summary judgment, and the court's denial of certification for appeal of the interlocutory order on violation, all prior to enrolling Governor's counsel as *additional* counsel for purposes of the State's being coerced to help fashion unwanted remedies under the protest of its prior objections and defenses;

(2) The entirety of the remedial proceedings took place subject to the timely objections and defenses already asserted for the whole case by the Attorney General;

(3) The Attorney General promptly reasserted those objections and defenses upon the merger of the whole case into final judgment ordering remedial injunctive relief and General Guste promptly countered the attempts then made by Governor's counsel, purportedly on behalf of the State, seeking immediate abolition of State constitutional and statutory provisions by their opposing all motions for new trial and/or stay of judgment;

(4) General Guste again made known his objections and defenses at the first opportunity given him by the district court, after the remand by the Fifth Circuit Court of Appeals for the purpose of allowing the single-judge district court to enter an assuredly valid final judgment, and;

(5) The district court's seemingly all-important previous remedial proceedings are now inconsequential by virtue of the district court's new Final Judgment reversing its previous liability judgment and not finding no violation.

The court below has transmogrified the 1974 Louisiana Constitution into a grotesque sham unrecognizable to its redactors and ratifiers, shifted from one State officer to another, internal sovereign powers in contravention of the allocation made by the State Constitution, and foisted upon the State of Louisiana an Executive form of government specifically rejected by its redactors. The continuing existence of this district court Judgment on the State attorney representation issue can only be considered an ongoing embarrassment to the ideals of federalism and a mockery of the jurisdictional principles of comity supported and required by this

Court through the years. Meanwhile, the appeal on the merits of Louisiana's higher education desegregation case languishes in the Fifth Circuit, with Louisiana in legal limbo.[3] This Court's power to issue the extraordinary writ of mandamus is General Guste's last hope for an immediate and adequate remedy.

## V. STATEMENT OF THE CASE

### A. State Attorney Representation in the Louisiana Higher Education Desegregation Case

The dispute between the Attorney General and the Governor was already in existence in *U.S.A. v. La.* at the time it was previously pending before this Court.[4] It arose on the district court level after the bifurcation of the case ended and upon the entry of the final judgment, which ordered remedies abolishing the popularly chosen four-board system of higher education governance explicitly established and mandated by the State Constitution and implementing laws. The Governor's counsel persisted in seeking immediate abolition of those State constitutional and statutory provisions by opposing Attorney General Guste's motion for a stay of execution of judgment, which this Court granted on August 18, 1989.

Prior to that, however, the Attorney General and his Assistant Attorneys General had been the original counsel of record for the State of Louisiana in the litigation from its outset on March 14, 1974, until the District Court's October 30, 1990 Judgment and Opinion and Order complained of herein, and were the *sole*

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[3] The United States has urged the Fifth Circuit "to hold this case until the Supreme Court has fully disposed of *Ayers*." Brief for the United States, No. 90-3874, p.10 (filed April 11, 1991).

[4] Most of the major documents up to that time on the merits of the case, including the original and amended complaints, the Consent Decree, the pertinent motions for summary judgment and related memoranda, the judgments and orders of the district court, and the report of the Special Master, as well as the constitutional and statutory provisions involved therein, were printed in the Joint Appendix to the Jurisdictional Statements in Nos. 89-556 and 89-557, hereinafter simply "Joint App. No. 89-556."

counsel of record enrolled for the State of Louisiana from the commencement of this suit until January 20, 1989, when General Guste, for the remedial part of the bifurcated trial, empowered Governor's counsel with a delegation of the Attorney General's own power to represent the State, which under the general provisions of Art. IV, §8, of the Louisiana Constitution of 1974 is withdrawable at the Attorney General's pleasure.

The Attorney General and his Assistant Attorneys General had already firmly established the official legal position and defenses of the State in the litigation for the whole case – *viz.*, that no remedial injunction prayed for was permissible because no constitutional, statutory, or other policy or practice of the State constituted a violation for which a remedy could lawfully be fashioned as far back as the State's May 10, 1974 answer. General Guste faithfully adhered to this official State legal position throughout the case.[5]

When, after the case merged together again in the final judgment, Governor's counsel persisted in seeking immediate abolition of State constitutional and statutory provisions by opposing motions for new trial and by opposing motions for stay of execution of judgment, the Attorney General, considering a conflict of interest between Governor's counsel and the State, withdrew, by written letters dated August 11, 1989 (App., pp. 64a-67a the authority he had delegated to them to represent the State as

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[5] The cosmetization performed in footnote 2 of the Opinion and Order of the district court below (App., p. 6a) masks the poignant truth revealed by the Record and the uncontradicted affidavit of former assistant attorney general Winston G. Decuir (App., p. 53a):

> "Sometime after Charles E. "Buddy" Roemer, III, was elected Governor, but before his appointed special counsel John N. Kennedy was enrolled as counsel for the State in January of 1989, John N. Kennedy began to attend some of the court's status conferences in the case and was allowed by the District Court to voice and advocate the positions and policies of the Governor. During the time period, however, he neither represented nor was enrolled as counsel of record for the State of Louisiana or any other actual party to the litigation."

*See* also the letter written to the district court by John N. Kennedy (App., p. 57a), wherein he admitted representing only the Governor during this period of time.

additional counsel and filed in the district court a motion redesignating counsel for the State. The district court held the motion in abeyance for more than a year while Governor's counsel continued to claim constitutional authority to represent Louisiana, including appearances as the Bar of this Court.

In the meantime, this dispute spread into other cases and areas of government, as Governor's Special Counsel Kennedy began insisting that the power allocated by the State Constitution to the Attorney General resided in the Governor.[6] Therefore, the Attorney General filed a petition for declaratory judgment and injunctive relief in State court to settle this vital question of State law. However, that State court action became Civil Action No. 90-4109 in the Federal district court below and the subject of this Petition for Writ of Mandamus.

### B. The State Court Petition Removed to Federal Court, the Basis for Civil Action No. 90-4109, *State ex rel. Guste, Attorney General v. Roemer, Governor, et al.*

The State Court Petition, which was denied on the merits by the federal court, below sought declaratory relief

> "declaring (1) that the STATE OF LOUISIANA has an inherent and sovereign right and interest in the legal subsistence and efficacy of its constitution as a whole, and to a full and good faith legal defense of the constitutionality of those provisions of the Louisiana Constitution declared invalid by the federal district court in *USA v. Louisiana;* and (2) that it is unconstitutional under La. Const. Art. IV, Sec. 8 (1974) for Governor ROEMER or his special counsel KENNEDY or LEVIN or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representatives of the State of Louisiana in *any* civil or criminal action or proceeding; and (3) that KENNEDY, LEVIN and CALOBRISI'S purported representation of the State of

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[6] A member of the Attorney General's staff received information from a staff member of another agency that John N. Kennedy had telephoned and instructed certain agency employees not to send over to the Attorney General for legal defense the petitions, complaints, and other pleadings in certain lawsuits, because the Governor's office was taking over that function of government.

> Louisiana in *USA v. Louisiana* was not authorized in law, was *ultra vires* and was unconstitutional, from the date of their lawful termination as attorneys for the State of Louisiana on August 11, 1989 until the present day, and that therefore all acts and statements by KENNEDY, LEVIN and CALOBRISI as a putative legal representative of the State during this period were null and void *ab initio.*"

State Court Petition, p. 9 (App., pp. 78a-79a)

The allegations of the State Court Petition raise only State law questions – *viz.*, (1) how Louisiana State Constitution and laws allocate the State's internal, sovereign legal representation power between two of its State constitutional officers; and (2) what are the State law duties of public attorneys representing the State to provide full and good faith defenses of State constitutional provisions.

Under the well-pleaded allegations of the State Court Petition, the cause of action alleged therein, on its face, does not arise under nor is determined by the Constitution, laws, or treaties of the United States, but rather arises solely under and is determined solely by the Louisiana State Constitution and laws enacted pursuant to it.

A hearing on a preliminary injunction was actually set, prior to defendants' notice of removal, for Friday, October 26, 1990, but was perforced cancelled as a result of defendants' notice and act of removal of the State Court Petition to Federal district court. Attorney General Guste filed a motion for immediate summary remand, for nullification of removal, for costs, expenses, and attorneys' fees, and for imposition Fed. R. Civ. Proc. Rule 11 sanctions, together with an alternative motion to remand in the same substance and a motion for an expedited hearing thereon, based upon the lack of removal jurisdiction apparent on the face of the State Court Petition.

The U.S. district court did not hold a hearing on any of the remand motions or conduct any trial or other hearing on the merits of the State Court Petition in Civil Action No. 90-4109. Rather, it exercised jurisdiction over it during the midst of proceedings already begun in Civil Action No. 80-3300, issued the judgment

denying the State Court Petition on the merits, and, with regard to the State Court Petition and action, castigated Attorney General Guste for (App., p. 28a) "being disrespectful of this Court's jurisdiction."

## VI. REASONS FOR GRANTING THE WRIT

### A. Removal of the State Court Petition Without jurisdiction

If the State court Petition removed in this case were filed originally as a complaint in a Federal district court, it would have to be dismissed for lack of subject matter jurisdiction. Because the lack of such jurisdiction is plain on the face of the Petition, the Federal district court should, upon initial receipt and review of the pleading, immediately issue the dismissal *sua sponte*. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3522 at 48 & n.12 (cases) (1975), as cited in *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 805 (D.C. Cir. 1984) (per Scalia, J.)

For the same reasons, the United States district court in this case should have already remanded the removed petition herein *sua sponte*. Every day that the Federal courts below hold up the State court proceeding based on this jurisdictionally defective removal, they give effect to the needless and unfair delay for which the removal appears to have been interposed.

1. The defendants' removal does not comport with 28 U.S.C. §1441 and the controlling precedents. This Court recognized, early on, the fundamental significance of removal to the constitutional system of a delicately balanced federalism existing between the Federal government and the several states – "the question of state power in our federal form of government." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 117 (1936).

The removal statutes must be strictly construed, for removal impinges upon a State's sovereignty in the exercise of its judicial power:

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' " [Citing cases]

*Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Thus:

> "Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. . . . The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." [Citing *Gully, supra*]

*Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

Removal of *Guste v. Roemer* to Federal court not only abridges "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts," *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (per Stone, J.), but cavalierly ignores "[t]he century-old jurisdictional framework governing removal of federal questions from state into federal courts," *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), quoted in *Caterpillar Inc. v. Williams*, 482 U.S. at 386, 392-93.

Plainly Congress "did not intend to authorize a removal where the cause of action depended solely on the law of the State," *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 462 (1894). Attorney General Guste's "well pleaded complaint," *Franchise Tax Bd. v. Laborers Trust*, 463 U.S. 1, 9

(1983), depends solely on the law of Louisiana. There is not a whisper of a federal question "in the plaintiff's statement of his own claim in the bill or declaration," *Taylor v. Anderson*, 234 U.S. 74, 75 (1914). "Tested by this standard, as it must be, the case disclosed by the petition was not one arising under a law of the United States." *Id.* at 76.

As recently at 1989, this Court emphatically reaffirmed these rules when, for the second time, it had to correct a Circuit Court of Appeals, in order to cause a remand of an improperly removed State court action. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). Therein, Your Honors reiterated the "well-pleaded complaint rule" emphasizing that the Federal question jurisdiction must appear solely from the cause of action pleaded on the face of the State court Petition alone, " 'unaided by anything alleged in anticipation for avoidance or defenses which it is thought the defendant may interpose.' " 109 S.Ct. at 1521, quoting *Taylor v. Anderson*, 234 U.S. at 74, 75-76.

A reading of the well-pleaded allegations of the State court Petition reveals that it raises solely predominant internal State law questions – (1) whether the State Governor or the State Attorney General has been allocated by the State Constitution the State governmental power to be the attorney for the State itself as a separate party and to control the presentation of the sovereign State's case in any civil litigation (State or Federal); (2) what are such attorney's duties to the State with respect to defending State constitutional and statutory provisions. Such issues can be decided and determined only by a delicate interpretation, clarification, and application of State Constitution and law – including, nonexclusively, Article IV, §§5 and 8, of the Louisiana Constitution of 1974; La. R.S. 13:5036; and La. R.S. 49:257(B). Only State courts of Louisiana can definitively interpret and apply this State constitutional and statutory law to the factual circumstances alleged in the State court Petition removed herein. *Accord, Massachusetts v. Feeney*, 429 U.S. 66, 67 (1976).

2. Removal cannot be based on common issues of fact and law between (1) a *State law question* raised in the State court Petition sought to be removed and (2) an assertedly

identical *State law question* already pending before a U.S. district court in another altogether different Federal question case merely as an auxiliary issue therein and before that Federal court on the basis of that court's mere pendant jurisdiction. Such is the fundamental error in defendants' attempt to remove the State court action herein, and it strikes at the very basis they gave for the removal.

The district court below held that, under Federal law, it, not the State court, had jurisdiction and "control [of] such issues." (App., p. 15a). In *Oklahoma Tax Commission v. Graham, supra*, the complaint itself, by identifying "the parties subject to the action," 489 U.S. at 840, provided information that taxes were being sought from Tribal Indians for activities conducted on an Indian Reservation. The mention of information which might indicate the presence of exclusive Federal jurisdiction "inherent in the complaint," *id.*, did not change the nature of the action alleged nor its arising under only State law. Here, the mere mention in the State Court Petition of Federal Civil Action No. 80-3300 as one particular instance, among others, wherein Governor's counsel has wrongly claimed and purportedly exercised the Attorney General's constitutional powers does not, under the *Graham* rationale, turn clearly State law issues into ones arising under Federal law.

*a.* First of all, the Attorney General's Motion to Designate Counsel in *U.S.A. v. Louisiana* does not raise the State law questions presented in the State court Petition, but was an exercise of the State power that that State court Petition seeks to clarify. The motion sought only the Court's formal recognition of such designation for the limited purposes of notice, service, and orderly procession of the litigation.

The Seventh Circuit in *U.S. for Owens-Corning Fiberglass v. Brandt Const.*, 826 F. 2d 643, 647 (7th Cir. 1987), held that a U.S. district court does not "acquire jurisdiction over [an] improperly removed . . . case by consolidating it with [a] related and properly filed . . . case." The Court

said that an improperly removed case was not properly pending before the district court so as to be susceptible to consolidation under Fed. R. Civ. Proc. Rule 42(a). Likewise, the district court here has unlawfully consolidated the removed case with *U.S.A. v. Louisiana* in direct contravention of the rule of law explained in *Brandt. Accord, Gardner v. Clark Oil & Refining Corporation,* 383 F.Supp. 151, 154 (E.D. Wisc. 1974); *North American Van Lines, Inc. v. Coleman*, 633 F. Supp. 632 (N.D. Ill. 1986).

### B. Comity Abstention and Remand

The internal State law questions presented by the State attorney representation question in Civil Action No. 80-3300 and by the State Court Petition in No. 90-4109 clearly invoke the doctrine of abstention required by this Court on the basis of comity in the genre of cases represented by *Louisiana Power & Light v. Thibodaux,* 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341 (1951). In the *Louisiana Power & Light* case, the City of Thibodaux brought in State Court an eminent domain proceeding which was removed to Federal Court on the basis of diversity of citizenship (not a grounds for removal herein). The U.S. district court stayed the Federal proceedings to let the State courts resolve the internal State question of whether State law had allocated to the City of Thibodaux the power and authority to expropriate the property. After the U.S. Court of Appeals reversed, this Court reversed the Fifth Circuit and reinstated the U.S. district court's order. An unsettled question regarding the allocation of a sovereign State's own governmental power among the State governmental infrastructure is precisely the same kind of issue presented herein regarding the State Constitution's allocation of legal representation power among State constitutional officers.

The district court's attempt to decide this question herein, instead of abstaining from it in No. 80-3300 and remanding it in No. 90-4109 to the State judiciary, disrupts

the uniform development and application of state constitutional law on this issue. *Cf. Burford, supra*, 319 U.S. at 333-34; *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968). That the district court reached out to decide a fundamental question of Louisiana constitutional law does not, of course, mean that it decided it right: "The Fifth Circuit's willingness of certify is in part a product of frequent state court repudiation of its interpretations of state law." *Lehman Brothers v. Schein*, 416 U.S. 386, 390 n.6 (1974).

The contention of Governor's counsel in their removal papers (App., pp. 91a-92a) that the cause of action pleaded in the State court Petition arises under the "Federal common law" of *Graddick v. Newman*, 453 U.S. 928 (1981), is plainly wrong.

*Graddick* does not constitute the authority that defendants persist in citing it for; specifically, *Graddick v. Newman* does not hold "that a state's governor is the proper representative of the state in litigation to which the state is a party." Defendants' *Notice of Removal of Case Pursuant to 28 U.S.C. Sec. 1441*, p. 2, ¶5. (App., p. 85a).

The opinion of Justice Rehnquist, issued after consideration and denial of the stay by the full Court, denies *Graddick* as being Federal case authority for the contentions made by Roemer, Kennedy, Levin, and Calobrisi and implied by the district court below. As recited in the opinions of Justices Powell and Rehnquist therein, Governor James was seeking neither to be the attorney for his State nor to provide legal representation for his State; his interest was as a separate party himself in his own person and as the "Receiver," under both earlier court order and Alabama statute, of the Alabama prison system. Governor Roemer is neither a party to *U.S.A. v. Louisiana* nor the "Receiver" of the Louisiana higher education system.

Nor does *Graddick* lessen any powers of any Attorney General to represent the State, if it is a party, or the State's interests, even if it is not. While defendants continually refer to the language by Justice Powell regarding Attorney General Graddick's lack of standing and prolonged inactivity in the case, the opinion by Justice Rehnquist clarifies that such language was not a holding by the full Court:

> "The Court has decided to deny a stay. Had this result been communicated without explanation, the parties might well have been left with the impression that the full Court adopted the rationale of Justice POWELL'S opinion accompanying his denial of the original application, *i.e.*, that applicant [Attorney General Graddick] lacks standing to seek a stay. I write separately to emphasize my view that such an impression would be erroneous." 453 U.S. at 938.

Attorney General Graddick was found to be a party himself to the litigation, and, as to his inactivity, Justice Rehnquist explained:

> "[I]t has been argued that applicant's lack of active participation as a party in this litigation prior to the District Court's release order somehow weakens his claim of standing as a party. I am aware, however, of no rule that conditions party status on the appearance of activity or results in automatic dismissal from the lack thereof." 453 U.S. at 940-41.

But most importantly for purposes of the removal and remand issues herein, Justice Rehnquist showed that Attorney General Graddick's authority to act on behalf of the State's interests *was governed by State law*, not Federal law. The governing law was found to be two Alabama statutes and State court jurisprudence thereunder, all of which left no doubt as to the Attorney General's authority:

> "These two statutes, taken together, convince me that the Attorney General possesses ample authority under Alabama law to seek a stay of the release order, *with or without the consent of the Governor*. But any doubts about applicant's authority could have been resolved by adopting the course this Court pursued in *Massachusetts v. Feeney*, 429 U.S. 66, 97 S.Ct. 345, 50 L.Ed.2d 224 (1976), and certifying the question to the State's highest court." 453 U.S. at 942-43 (emphasis added).

Thus, *Graddick* itself recognizes that the cause of action removed in No. 90-4109 raises only State law questions of

which the Federal district courts do not have original jurisdiction and that these issues – including not only those raised in the State court Petition but also the State attorney representation issue in *U.S.A. v. La.* – are ultimately controlled by State law.

1. During the remedy proceedings, the Governor's counsel advocated, not the official State's legal position already established by the Attorney General protecting and defending the official policy interests of the state "as expressed in [its] statutory and constitutional provisions," *White v. Weiser*, 412 U.S. 783, 795 (1973), but rather the contrary and irreconcilably conflicting Governor's own personal and political agenda constituting his mere "proffered" policy for the State, *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197 (1972). In this regard, the proposals of Governor's counsel for remedy made no attempt whatsoever to protect the explicit State's constitutionally and statutorily mandated four-board structure of higher education governance; they suggested, only alternatively, the Governor's political agenda for changing the State Constitution's higher education governance to a single-board system.

After being enrolled, Governor's counsel did not confer with the Attorney General about and did not obtain Attorney General Guste's consent to their remedial filings and arguments.[7]

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[7] The district court's confusion of the Attorney General's consent to enroll Governor's counsel to render remedial ideas during remedy proceedings (after their approval of the Attorney General's defense of the State's constitutional and statutory policies during the liability proceedings) with the actual contrary filings and arguments made by them thereafter, all for the purpose of endeavoring to estop the Attorney General from further asserting, after merger of the bifurcated proceedings upon entry of final judgment, the State's already established defenses for the whole case, constitutes a baseless, legally erroneous, and meaningless conceit at odds with the uncontradicted affidavit of Attorney General Guste (App., pp. 47a-48a):

> "I permitted the enrollment of the Governor's counsel as an accommodation to the Governor so as to allow him to tender whatever remedial ideas he had to the Court. Throughout the

(Continued on following page)

Plaintiff United States did not seek, in its complaint, in its motion for summary judgment on violation, nor otherwise, to have the State's four-board structure invalidated. Instead, the United States' complaint and motion for summary judgment sought only a declaration of violation with respect to vestiges remaining from prior *de jure* segregation policies. As early May 10, 1974, the answer filed by the Attorney General on behalf of the State revealed that Louisiana's four-board structure did not come into existence until more than a decade after the end of *de jure* segregation in the State's public colleges and universities and, therefore, was not and could not be one of "the remaining vestiges of the former *de jure* segregated system" (692 F. Supp. at 658; Joint App. No. 89-556, p. 35a). In lieu of evidence on the matter, the court below 718 F.Supp. at 505; Joint App. 89-566, p. 45a) ruled that it was a "*truism*" that the State Constitution's four-board structure violated Title VI of the 1964 Civil Rights Act and proceeded therefrom to order the single-board structure as a remedy to correct the asserted *truistic* violation.

2. Governor's counsel then brought to fruition their conflict of interest against the State after merger of the

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remedial stage of these proceedings, however, it was my firm belief, and it remains my firm belief, that it is beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure which is protected by Louisiana's Constitution.

"Whatever the Governor's policy position, it is my sworn duty as Attorney General to defend Louisiana's Constitutional and statutory provisions against judicial orders that impinge upon Louisiana's sovereignty. I intend to do so.

"It was not my intention in permitting the enrollment of the Governor's special counsel to waive my professional legal judgment or my constitutional duty as Attorney General of Louisiana regarding Louisiana's multiple-board system of higher education. Nor have I ever given consent to the abolition of our State's multiple-board system by federal judicial decree, as does the Governor's special counsel."

bifurcated case was effected by the entry of the final judgment, the remedial decree of July 19, 1989. At that time, the Board of Supervisors for Southern University and A. & M. College ("Southern") had filed motions for new trial and/or to alter and amend judgment and for a stay of execution of judgment. These motions were designed to advocate the validity of the State's constitutional and statutory provisions establishing and mandating the popularly-chosen four-board higher education governing system that had been ordered abolished within thirty days of the judgment and to preserve them and a meaningful judicial review on appeal of the ordered abolition. Governor's counsel, purporting to act on behalf of the State, filed oppositions to both of these motions and thereby sought immediate abolition of these provisions of State Constitution and law. The district court issued a Minute Entry doubting Southern's standing to file the motion and expressly and specifically citing the lack of supportive filings from the Attorney General. It was in prompt and direct response to the district court's own Minute Entry that the Attorney General made those supportive filings and eventually joined with the parts of Southern's motions designed to protect the constitutional, statutory, and other official policies of the State[8].

On appeal to this Court, Governor's counsel continued their professional conflict of interest against the State by opposing, purportedly on behalf of the State, the stay applications in A-126 and A-127 and by attempting to dismiss the State's appeal, *Ex rel. Guste*, in No. 89-556. It was only when it became apparent that Governor's counsel were hardened in their conflict of interest to invalidate Louisiana's constitutional and statutory provisions that Attorney General Guste sent them the August 11, 1989, letters (App., pp. 64a-67a)

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[8] It is a mystery how either the district court or any of the parties could be surprised at the Attorney General's filings, given all the pleadings, objections, and defenses filed by the Attorney General for more than fourteen years throughout the case since its inception, the district court's own Minute Entry, and the fact that Southern's motions sought to protect the State's interests in its constitutional and statutory provisions, while those of Governor's counsel sought immediate abolition of them.

terminating and withdrawing the authority he had given them to represent the State.

Apparently agitated that, in the district court's own mind, "Mr. Guste's next step in attempting to reverse the State's position on remedy was to bring this case before the United States Supreme Court," (App., p. 12a) the district court disqualified the Attorney General from the State constitutional power of his State office to provide the legal defense of the State's constitutional and statutory provisions in this case. In so doing, the district court appears to have deluded itself into thinking that the whole case started with the remedy-fashioning part of the bifurcated proceedings and that all the pleadings, objections, and defenses that has gone before were all for naught. This plainly ignores the jurisprudence of this Court to the effect that all of the proceedings prior to final judgment, including those leading to interlocutory orders, "become merged in the final decree," *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588 (1926), and that this Court or other proper appellate court, upon "reviewing the final decree . . . , is called upon to notice and rectify any error that may have occurred in the interlocutory proceeding," *Hamilton Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916), or in "the whole case," *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 284 (1897).

General Guste, of course, was not attempting to "reverse" the State's purported legal position established by Governor's counsel but was continuing to assert the State's official legal position which he had already established early on for the whole case but which was deviated from by Governor's counsel when they brought their conflict of interest to full fruition after entry of the final decree.

On October 30, 1990, the district court entered a final judgment reversing its prior judgment on liability and now finding no violations. Ironically, the district court has disqualified the Attorney General for being inactive in inconsequential remedial proceedings and has denied the right of the Attorney General to defend on appeal the State's now successful defense on liability at the trial (on summary judgment) in which the Attorney General was the *sole* advocate on behalf of the State. The district court has empowered and appointed Governor's counsel to represent the State on appeal merely because they were "active" in the now

inconsequential remedial proceedings but were not even enrolled in the litigation during the proceedings on liability.

3. Rejecting the foundations of constitutional democracy and republican government, the district court erroneously held that (App., p. 25a) "[t]he issue is who establishes policy for the State in this litigation, not who is the real client" and that (App., p. 27a) "the Court must reject as lacking in legal support Mr. Guste's efforts to have his choices predominate over those of the Governor." The "choices" advocated throughout this litigation by the Attorney General have not been *his* at all but rather those of the people of the State ratified in *their* Constitution and those legitimately made in State's statutes by their elected representatives.[9] The Governor has no authority to have his choices predominate over those of the people as expressed in the State Constitution nor over those of the people's representatives as expressed in State statutes, even if the district court likes the Governor's policy choices better than those of the people and the legislature and locks them into the State's defense by empowering Governor's counsel

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[9] *People ex rel. Deukmajian v. Brown*, 624 P.2d 1206 (Cal. 1981), upon which the Governor's counsel rely, is clearly distinguishable. Attorney General Guste has not sued the Governor; nor is Attorney General Guste guilty of any ethical impropriety in this case. Rather, as an accommodation to Governor Roemer, the Attorney General permitted the Governor's counsel to advocate a single-board remedy before the district court as an alternative remedy under protest, but the Attorney General never abandoned his original position and first alternative that such a remedy would violate the state Constitution and was impermissible. *See* his uncontradicted affidavit (App., p. 47a). The Attorney General did not advise the Governor to the contrary, as was the case in *Deukmajian v. Brown*. At any rate, "we are not dealing with private lawyers. Rather, different ethical considerations are at stake here." *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197, 1202 (Me. 1989). The majority of courts confronting similar issues have recognized the unique status of the Attorney General. *Id.* at 1203; *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977); *State ex rel. Allain v. Miss. Pub. Serv. Com'n*, 418 So.2d 779, 783-84 (Miss. 1982). "This special status of the attorney general – where the people of the state are his clients – cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office." *Conn. Com'n v. Conn. Freedom of Information Com'n*, 307 A.2d 533, 537 (Conn. 1978). Attorney General Guste is guilty of no ethical breach here. To the contrary, he is fulfilling his constitutional and statutory duties to defend the State's Constitution and laws faithful to the sovereign will of the people of Louisiana.

to be the sole attorneys for the State and by disqualifying the Attorney General.

The Louisiana 1974 Constitution embodies the consent of the governed and the terms and conditions of thier governance. Abolition of its mandatory policies (such as the four-board higher education governing system) cannot be sought or effected by officers of the State except in accordance with Article XIII amendment procedure. Such constitutional policies cannot be *de facto* nullified by legislation or gubernatorial action. *Williams v. State,* 538 So.2d 193 (La. 1989). Nor can their abolition be effected by estopping State officials from asserting and protecting them in litigation. *Ladnier v. Mollere,* 89 So.2d 301, 307-08 (La. 1956).

In ruling to deprive Louisiana of its constitutionally mandated attorney, the district court exceeded any inherent authority that a Federal district court might possess to regulate the admissions to its own bar and to protect the orderly administration of justice. Consequently, the district court erred in holding that (App., p. 14a) "neither state statutes nor state courts can be dispositive of any dispute over representation of a party in this federal court case."

### C. Demolition of the State Constitution

1. Even though the district court disqualified the Attorney General improperly, the court below still had to rely on a delicate interpretation of the State Constitution – which should have been done by the State Court not the federal court below. The most obvious, gargantuan error charging forth from the Federal district court's miscreation of the Louisiana Constitution of 1974 is its reallocation of powers among State executive branch officers as though the Constitution adopted a "cabinet" form of government similar to the executive branch of the state of New Jersey, where the people elect a Governor who appoints all the cabinet officials, including the attorney general. In truth and fact, the redactors of the Louisiana Constitution of 1974 considered and specifically rejected such "cabinet" form of government in favor of the "divided-executive-powers" form of government actually adopted and embodied in the Louisiana Constitution.

Thus the district court plainly erred in purporting to hold that (App., pp. 19a-20a)

> "as a matter of Louisiana state law, the Governor, as head of the executive branch, is the primary representative of the State herein and, as such, may dictate the State's course in this litigation. *Cf. State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So.2d 756 (La. App. 1st Cir. 1983) (upholding the Governor's interpretation of a state statute over the Attorney General's in a dispute between the State and a third-party), *appeal dismissed*, 453 So.2d 557 (La. 1984). This conclusion is based upon the 1974 Louisiana Constitution's clear designation of the Attorney General as a member of the executive branch of the government and, as such, an executive officer inferior to the Governor. *Accord Graddick*, 453 U.S. at 934, 102 S.Ct. at 8."[10]

Such holding assumes, erroneously, that the executive branch adopted by the Louisiana Constitution of 1974 was of the "cabinet" form, common among the original colonies wherein royal governors possessed all of the executive powers, which were unified in him.

Just before and during the Constitutional Convention of 1973 ("CC'73"), then Governor Edwards was in favor of a "cabinet" form of government for Louisiana's executive branch, and the redactors of the 1974 Louisiana Constitution considered several variations of such "cabinet" form of government.

After consideration of a "cabinet" form of government for the executive branch, the CC'73 Committee on the Executive Department and the CC'73 delegates drafted substantially the same

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[10] The district court's reading of *State ex rel. Guste v. Texaco, Inc.* is strange indeed. That case had nothing to do with a dispute between then Governor Treen and the Attorney General over who was the State's attorney, who would control the advocacy of the State as a separate party in its own name, or what the defense of the State as a separate party in its own name would be. No one in that case doubted or refuted that the Attorney General was the State's attorney and controlled the State's legal position and advocacy therein. Rather, that case was one wherein then Governor Treen, as a separate party himself, "may intervene in any such litigation" and "[a]s an intervenor, the Governor may express his views and take positions contrary to those argued by the attorney general." *Ex parte Weaver*, 570 S.W.2d 675, 684 (Ala. 1990).

"divided-executive-powers" form of government adopted in Minnesota and numerous other states, and ratified by the people of Louisiana. Louisiana's 1974 Constitution is similar to Minnesota's in the following respect:

> "Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers."

*State of Minnesota, ex rel. Mattson v. Kiedrowski,* 391 N.W.2d 777, 782 (Minn. 1986).

The Louisiana Constitution of 1974 embodies the "divided-executive-powers" form of government wherein each of several executive officers are directly allocated a differentiated segment of executive power. The authority it grants to the Attorney General, as chief legal officer, is excluded from the Governor, as chief executive officer.[11] *Accord, Feeney v. Commonwealth,* 366 N.E.2d 1262 (Mass. 1977); *Martin v. Thornburg,* 359 S.E.2d 472 (N.C. 1987).

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[11] *State ex rel. Strauss v. Dubuclet,* 25 La. Ann. 161 (1873), does not support the contrary view of Governor's counsel and the Federal district court below, and that non-support is made clear by a review of the record of the appeal in that case in the Louisiana Supreme Court archives (another reason that the Federal district court should have abstained in Civil Action No. 80-3300 and remanded Civil Action No. 90-4109 to let the State court decide this intricate and delicate State law issue). The Governor's authority in that case was Act 21 of the Second session of 1872, which, after placing primary power in the Attorney General, authorized the Governor to appoint counsel to assist the Attorney General or to succeed to him in the event of his inability or of a vacancy in his office, not when representing the State as a separate party, as herein, but rather when representing State ministerial officers, such as then State Treasurer Dubuclet. This gubernatorial power was statutorily predicated in the Act itself on the Governor's then constitutional power to fill a vacancy or inability in the office of Attorney General by appointment under the old "Carpet Bag Constitution" of 1868 (West's LSA-Constitution, Vol. 3, p. 103). As explained in *State ex rel. Baldwin v. Dubuclet,* 27 La. Ann. 29 (1875):

> The Attorney General is the proper officer to represent the State in all her lawsuits, and the statute in question was not intended to deprive him of the control and management of his cases.

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2. By holding that the constitutional language "*chief legal officer*" was "without substantive meaning with regard to powers, functions or duties," (App., p. 24a) the district court below directly contravened the Louisiana Supreme Court's

> "cardinal rule of constitutional and statutory construction that such enactments should be construed, where possible, so as to give force and effect to each provision and to render none nugatory."

*Central Elec. Co. v. La. Public Serv. Comm.*, 205 So.2d 389, 391 (La., 1967). In addition,

> [W]here the language of a constitutional provision is clear, . . . we cannot decide constitutional questions on the basis of the drafters' debate, but must rely on the finished product, which is the expression of the voters who adopted the constitution.

*Bank of New Orleans and Trust Company v. Seavey*, 383 So.2d 354, 356 n.7 (La. 1980). Thus, the district court erred in negating the first paragraph of Art. IV, § 8, by relying on the isolated floor remark of one delegate. Moreover, Delegate Gravel was appointed by the Governor to represent him as an at-large delegate to CC'73 (*RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: JOURNAL OF PROCEEDINGS*, Vol. I, p. 3) and, as such, an opponent of the Attorney General's predominant independence from the Governor.

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> In order to protect the public interest in any particular case where the Attorney General was interested, or was unable to act from death, resignation, absence, or from any other cause, this statute authorizes the Governor to appoint an attorney for such case. It does not authorize him to give consent for the transfer of any particular case and for the trial thereof before the return day, at a different term of the court. The act gives him no personal control of the case whatever. When the condition happens upon which he has authority to supply counsel for the State, the attorney designated by him takes control of such case.

*Id.*, at p. 30. The Governor today no longer has any of those constitutional powers upon which his appointment authority in Act 21 of the Second Session of 1872 was predicated. *See* Article IV, §§ 13, 16, 17, and 18(C), of the Louisiana Constitution of 1974.

The district court also erred in falsely concluding from Delegate Stagg's half-emphasized remark – "without having [*sic*] [the Attorney General] so much authority that he might become more than just the state's chief legal officer" (emphasis deleted) – that the Attorney General is not, nevertheless, fully and exclusively the chief legal officer of the State, with, as Delegate Stagg himself recognized, *"the powers that . . . adhere to that office for him effectively to be able to be the state's chief legal officer [and] to guard the rights of all of the people of the state."* App., p. 23a (emphasis added).

Indeed, the first paragraph of Art. IV, § 8, of the Louisiana Constitution of 1974 came from CC'73's Committee on the Executive Department. If any constitutional history is appropriate for consultation, it is the report on the staff memoranda of that committee. A definitive staff report recommended that the Attorney General have *the greatest independence possible* of all the executive branch officers. *See* Cmte. on Executive Dept., Staff Memo No. 2, March 26, 1973, Exhibit D, *RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS,* Vol. XI, p. 173. The final language of the committee, particularly in what is now the first paragraph of Art. IV, § 8, embodied this recommendation.[12]

3. Significantly, the Alabama Supreme Court recently decided that:

> "The overwhelming authority supports the decision of the Court of Civil Appeals that the attorney general has the power to manage and control all litigation on behalf of the State of Alabama."

*Ex Parte Weaver,* 570 So.2d 675, 684 (Ala. 1990). This opinion, which was not referred to by the Court below, thoroughly canvasses state authorities and sustains the Attorney General's

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[12] This case exemplifies the very reason for the Attorney General's independence of the Governor. The Attorney General's duty is to protect and defend the democratic policy choices made by the people as expressed in their Constitution and by their elected representatives in laws, while the Governor, caught up in the struggles of State administration, might well forego the State's constitutional and statutory structures and policies in favor of his own political agenda for mere efficiency or, worse, undemocratic arrogation of power.

authority as chief legal officer of the State to control litigation even against the wishes of the Governor. *Accord, Feeney v. Commonwealth,* 366 N.E.2d 1262 (Mass. 1977); *Martin v. Thornburg,* 359 S.E.2d 472 (N.C. 1987). Even a passing reference to controlling Louisiana Supreme Court decisions shows that the result in Louisiana is the same.

It has always been the law in Louisiana that "it is the duty of the Attorney General and his assistants to prosecute and defend all suits or other legal proceedings to which the state is a party, and to have charge of all legal matters in which the state, as a distinct entity, apart from the other entities or corporate agencies it may create, has an interest." *Saint v. Allen,* 134 So. 246, 248-49 (La. 1931). *Accord, State ex rel Porterie, Attorney General v. Walmsely,* 160 So. 91 (La. 1935):

> "This is a suit by the state, and by the Attorney General, in his official capacity, he being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervenor."

And again:

> "The Attorney General has unquestionably the right to file suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administration office or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution."

*State v. Texas Co.,* 7 So.2d 161, 162 (La. 1942). That the Attorney General is the proper legal representative of the State in judicial proceedings is of venerable lineage in Louisiana, tracing back to François-Xavier Martin's pronouncement for the Louisiana Supreme Court in *State v. Bank of Louisiana,* 5 Mart. (N.S.) 327, 344 (1827): "The authority of the attorney general to prosecute or defend any suit, in which the state is concerned, does not, however, result from mere presumption. It is necessarily implied from the nature of his office, and is expressly given by the act of assembly defining

his duties." This is precisely the duty of the Louisiana Attorney General under Article IV, § 8, of the Louisiana Constitution of 1974, *viz:*

> "As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding. . . . "

*See* also R.S. 13:5036 and R.S. 49:257(B) (App., p. 36a).

The decision of the District Court below, respectfully, ignores these controlling Louisiana precedents. As Professor Hargrave has noted, speaking of the constitutional authority of the Attorney General under Article IV, § 8: "Subsection (1) in referring to his power to institute, prosecute or intervene in any civil action or proceeding is a continuation of prior provisions *and is unlimited."* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974,* 37 La. L. Rev. 765, 835 (1977) (emphasis added).

### D. Propriety of Remedy By Writ of Mandamus

We have demonstrated "the extraordinary abuse of discretion disclosed by the power attempted to be exerted, the confusion and disregard of constitutional limitations which the asserted power implied," and "the absolute want of authority of the [district court] over the cause." *Ex parte Harding,* 219 U.S. 363, 373, 374 (1911). Mandamus to control improper removal is limited to extraordinary circumstances, but they are surely present here. Removal of *Guste v. Roemer* from the state court system was lawless. Attorney General Guste has been deprived of his constitutional office for faithfully defending Louisiana's Constitution and laws before the district court and at the Bar of this Court. His integrity has been impugned without a hearing for no good reason.[13] "[T]his want of jurisdiction of the inferior court in a summary proceeding to

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[13] General Guste has publically announced he will not seek reelection after twenty years' service as Louisiana's Attorney General. His term of office expires January 13, 1992, and he desires to leave the Attorney General's office with its constitutional authority intact and his personal record unsullied. Time is plainly of the essence here. *Cf. Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d 1, 5 (1st Cir. 1984).

remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which [mandamus] is the appropriate remedy." *Ex parte Bradley,* 7 Wall. 364, 377 (1868).

It has been settled law for over a century that "the exceptional rule" of mandamus, *Ex parte Harding,* 219 U.S. at 379, lies to compel a district court to remand a case to state court where the lack of removal jurisdiction is patent. *In re Winn,* 213 U.S. 458, 466-67 (1909), citing, *inter alia, Virginia v. Rives,* 100 U.S. 313 (1880); *Ex parte Wisner,* 203 U.S. 449 (1906). In such a situation,

> "the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or an appeal. . . . [W]here, without any right, a court of the United States has wrested from a state court the control of a suit pending in it an appeal or writ of error, at the end of a long proceedings, which must go for naught, is not an adequate remedy."

*In re Winn,* 213 U.S. at 467.

Our research reveals one case directly on point in which mandamus issued requiring the district court to remand to the state tribunal "in order to maintain sound and legally correct relations between the federal courts and the Commonwealth government." *Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d 1, 5 (1st Cir. 1984). Romero-Barcelo was the Governor of Puerto Rico. He was sued by the President of the Senate of Puerto Rico. The Governor removed the matter to federal court. The district court refused to remand what was essentially an internal political conflict between two coordinate branches of state government. Said the First Circuit: "We conclude that the district court committed jurisdictional error in retaining this case. And, despite [the Governor's] complex, and often heroic, arguments to the contrary, the error is a fairly obvious and serious one." 748 F.2d at 4. And more:

> "[O]f overarching importance, far outlasting the tempests of the present controversies, is the importance of both Commonwealth and federal courts adhering to their proper jurisdiction. Here we have found the district court to have been persuaded to misunderstand the clear meaning of the removal statute as expounded in a long line of Supreme Court (and circuit court) cases, and to remove a case to federal court that did not fall within 28 U.S.C. § 1441. The analysis leading to this result, if allowed to stand, would apply equally to a host of other cases, thus needlessly interfering with Commonwealth legislative, executive, and court proceedings, and undermining basic principles of comity. Those principles suggest that such unauthorized intrusion should be speedily corrected."

*Hernandez-Agosto v. Romero-Barcelo,* 748 F.2d at 4-5. This Court denied the Governor's application for a stay of mandamus. 469 U.S. at 927.

*Guste v. Roemer* should be decided the same way.

## VII. CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus to the district court below[14] directing it to vacate its October 30, 1990, judgment, opinion and order on the representation of the State and remand the matter to the Civil District Court for the Parish of Orleans, Honorable Revius O. Ortique, Jr., J., whence it came.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

---

[14] Alternatively, this Court should order the Fifth Circuit to vacate the judgment in Civil Action No. 90-4109 and to remand the cause to the district court, with directions to remand the cause to the State Court whence it came.

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant
Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

PAUL R. BAIER
Special Assistant
Attorney General

April 23, 1991

No. _____

In The

# Supreme Court of the United States

October Term, 1990

*IN RE:* STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

*Petitioner,*

**Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana**

## APPENDIX TO PETITION FOR WRIT OF MANDAMUS

(Counsel listed on inside cover.)

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

PAUL R. BAIER
Special Assistant
Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
*Attorneys for the State of Louisiana*

23 April, 1991

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 90-3841

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IN RE: STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND THE HONORABLE WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

Petitioner.

FILED NOV 28 1990

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On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

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Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ M. Thompson
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| UNITED STATES OF AMERICA | Civil Action No. 80-3300 c/w 90-4109 |
| VERSUS | |
| STATE OF LOUISIANA, ET AL. | Section "A" |
| | FILED OCT 30 '90 |

JUDGMENT

Considering the Court's Opinion and Order of October 30, 1990,

IT IS HEREBY ORDERED that John N. Kennedy and Joseph J. Levin Jr. are designated as sole trial counsel representing the State of Louisiana in Civil Action No. 80-3300 and that William J. Guste, Attorney General, is authorized to appear in Civil Action No. 88-3300 solely as an amicus curiae. In the event that any court of appeal should reverse this Order, then John N. Kennedy and Joseph J. Levin Jr. are authorized to appear as amici curiae.

IT IS FURTHER ORDERED that the petition of William J. Guste for declaratory judgment (Civil Action No. 90-4109) is DENIED on the merits at his cost.

New Orleans, Louisiana, this 30th day of October, 1990 at 2:11 p.m.

/s/ Loretta G. Whyte
CLERK OF COURT

Approved as to form:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| UNITED STATES OF AMERICA | Civil Action No. 80-3300 c/w 90-4109 |
| VERSUS | |
| STATE OF LOUISIANA, ET AL. | Section "A" |

FILED OCT 30 '90

OPINION AND ORDER ON THE REPRESENTATION OF THE STATE

This case is before the Court on the motion of the Attorney General of the State of Louisiana to Designate Counsel for the State and Withdraw Designation of Additional Counsel [Record Document No. (R.Doc.) 517A]. Civil Action No. 90-4109 is also before the Court on the motion of the Attorney General to remand to state court [R.Doc. 9]. The Attorney General seeks to prevent the Governor of the State of Louisiana, acting through Special Counsel John N. Kennedy and associates Joseph J. Levin, Jr. and Carla Calobrisi,[1] from appearing in these proceedings. For the following reasons, the Court DENIES both motions.

I.

In 1974, the United States filed this case, alleging that the State and other defendants were violating Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. In 1981, the

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[1] On October 16, 1990, the Court granted Carla Calobrisi's own motion to withdraw as co-counsel herein. *See* R.Doc. 554.

parties entered into a Consent Decree in an attempt to resolve the issues before the Court; by December 31, 1987, when the Consent Decree was to expire by its own terms, there was a volley of countering complaints that the State had not lived up to its obligations and that the Consent Decree was fiscally impossible to fully implement.

Because, in the final analysis, the Consent Decree presented an unworkable "band-aid" type solution to the enormous problems in Louisiana public higher education and because no party took any action to extend or substantially amend the decree before its expiration, the litigation returned to "square one," with all issues reopened. *See United States v. Louisiana*, 692 F. Supp. 642, 647-49 (E.D. La. 1988). Following several conferences, it was determined that the Court could resolve the case most expeditiously by addressing liability first and then, if any was found, to proceed with the time-consuming process of fashioning a remedy.

Accordingly, on May 13, 1988, the United States and one of the defendants filed cross-motions for summary judgment on liability. On June 6, 1988, Mr. Guste's Assistant Attorney General Winston DeCuir filed an opposition to that motion. *See* R.Doc. 249. On August 2, 1988, the Court found liability, *see United States v. Louisiana*, 692 F. Supp. at 653-58, and thereafter proceeded to address the issue of remedy. That June 6th paper was the last the Court heard from the Attorney General in any material respect, until after the case at the trial level was effectively concluded, as is detailed more fully below.

In January 1988, a new Governor, Charles E. "Buddy" Roemer III, took office. He had promised, among other

things, a political agenda for reform of higher education. The Attorney General and others apparently briefed him on the lawsuit; to show that the new governor was given notice of the State's defense and substantially agreed with its content, John N. Kennedy, the Governor's Special Counsel, co-signed the State's memorandum in opposition to the United States' summary judgment motion. *See* R.Doc. 249.

At that time, Mr. Kennedy was not enrolled as counsel in the case and did not actually participate in the State's defense nor in the preparation of the memorandum. Matters soon changed, however, when the case entered its remedy phase; the Governor, acting through Mr. Kennedy, took a highly active role in the case, including at almost all conferences in chambers with all counsel who desired to appear. The list of court appearances by Mr. Kennedy forms a stark contrast to the list of purported appearances of the Attorney General's staff, which, as indicated below, amounted to receiving mail and silently attending several status conferences.[2]

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[2] *Compare* R.Doc. 545, Exh. 1, at 2-6 *with* R.Doc. 547, Exh. A, at 8-16. In addition, the Court's workfiles reflect attendance by attorneys for the Governor and from the Attorney General's office at the following in-chamber conferences:

| | |
|---|---|
| 02/29/88 | Mr. Kennedy and Mr. DeCuir |
| 03/16/88 | Mr. Mongrue, a member of the Attorney General's staff |
| 03/29/88 | Mr. Kennedy and Mr. DeCuir |

(Continued on following page)

In November 1988, Joseph J. Levin, Jr. was also retained to represent the State with Mr. Guste's knowledge and explicit consent. Thereafter, on January 18, 1989, Assistant Attorney General DeCuir filed a motion formally requesting this Court to admit John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (Mr. Levin's associate) as additional counsel to represent the State; the Court granted the motion and designated Mr. Kennedy as lead trial attorney, Mr. DeCuir as local attorney, and Mr. Levin and Ms. Calobrisi as additional counsel. *See* R.Doc. 319A.

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|---|---|
| 08/24/88 | Mr. Kennedy and Mr. Walker for the Governor and Mr. DeCuir and Ms. Benoit from the Attorney General's office |
| 11/22/88 | Mr. Kennedy and Mr. DeCuir; also, Governor Roemer |
| 12/16/88 | Mr. Kennedy, Mr. Levin, and Ms. Calobrisi for the Governor and Mr. Riddick from the Attorney General's office |
| 01/25/89 | Mr. Kennedy, Mr. Levin, and Ms. Calobrisi for the Governor and Mr. Riddick from the Attorney General's office |

The Governor attended at least one other status conference before the Panel, but the court is unable at this time to recall which one.

Notwithstanding the magnitude of this case and its potential impact on the future of education in Louisiana, Attorney General Guste made no personal appearance after the consent Decree was signed in 1981 until after the proceedings on remedy were essentially over.

Mr. Kennedy's participation in this case, which began in early 1988 and continues to this day, has included the submission of formal filings to the Court, as well as his active participation at hearings, status conferences, depositions, settlement conferences and negotiations, and similar related meetings. After he became involved in the case, Mr. Kennedy, along with Mr. Levin, took the lead in the State's representation, drafting documents, filing motions, conducting discovery, attending hearings, and presenting evidence on behalf of the State, all with the tacit approval of the Attorney General.

The period from August 1988 through July 1989 was the most active period in this litigation. Throughout this period, numerous hearings and court conferences were held, including proceedings before the Special Master on the issue of remedy. Yet the Attorney General's office took what may be generously described as a passive role. Assistant Attorney General DeCuir attended most of the conferences before the Court, but absolutely no filings were received nor was any active part taken by the Attorney General himself or his office. As the Attorney General's own submissions reveal, his office was included on the court's mailing list and received copies of all papers filed by other attorneys. His attempt to classify as appearances before the Court the appearance of his office on mailing lists and certificates of service is, to say the least, misleading to a reader unfamiliar with this case. Such contentions highlight a focal problem in this case: the Attorney General refused to do any more than sit idle, receive mail and then, on the eve of the finality of an order that would have largely completed the case at the

District Court level, complain of the Court's refusal to rule as the Attorney General deemed appropriate.

On July 19, 1989, following innumerable hearings on the issue of remedy and the costly appointment of a Special Master, this Court issued its Opinion and Order on remedy. By then, termination of the case was long overdue, especially considering the time, effort, and taxpayer money expended and the Court's perception of certain parties' power-mongering to the detriment of equal educational opportunity. After the entry of this Remedial Order and just before the expiration of the period to request relief under Rule 59, Attorney General Guste emerged; to the Court's utter surprise and having never indicated that he espoused a position contrary to those he appointed to represent the State, he attempted an effective reversal of the State's position on remedy. Specifically, on August 2, 1989, *after* this Court had issued its Remedial Order and while Governor Roemer was out of the country, Mr. Guste filed a post-trial motion, entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment." *See* R.Doc. 499.

Mr. Guste's challenge to the Remedial Order was both puzzling and surprising to most of the parties.[3] In his "notice to join," he designated Southern's counsel,

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[3] Southern, however, was not surprised. Not only did Southern know Mr. Guste was joining in its motion, but also Mr. Guste admitted that Senator Jefferson, counsel for Southern, prepared Mr. Guste's Notice to Join and actually filed the notice for Mr. Guste. *See* R.Doc. 545, Exhs. 1-2.

State Senator William J. Jefferson, as counsel to represent the "particular interests of the Attorney General." Previously, throughout the litigation, Southern had been an opponent of the State and the remaining defendants and had closely aligned itself with the plaintiff. Apparently realizing the blatant conflict of interest created by this designation, Mr. Guste moved the very next day to withdraw his appointment of Senator Jefferson and further to "enroll" himself and certain members of his staff as counsel for the State. *See* R.Doc. 508. Notwithstanding this withdrawal, however, he still gave notice that he joined Southern's motion. *See* R.Doc. 507.

The obscurity of Mr. Guste's contention on representation is best illustrated by his belated objection to the creation of a single governing board for public higher education in Louisiana to replace the current four boards. The single board was a principal remedy unceasingly and publicly promoted by the State through Mr. Kennedy and fully supported by the Board of Regents for the State of Louisiana ("Regents"), the Board of Trustees for Louisiana State Colleges and Universities ("Trustees"), and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"). Given Mr. Guste's contention that he actively participated in the proceedings during this period, and his own admissions that his assistants attended status conferences and his office received copies of all filings, Mr. Guste is certainly charged with knowledge of all submissions to the Court. Yet he made no objections to the actions taken on behalf of the State. Thus, it is difficult to understand Mr. Guste's

current position that he did not consent to all actions taken by Mr. Kennedy before August 2, 1989.[4]

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[4] The following chronology of events unequivocally refutes the contention and inference that on August 2, 1989, Mr. Guste was suddenly surprised by the Court's adopting the Special Master's recommendation to create a single board.

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|---|---|
| 4/18/89 | Special Master's recommended report filed (*including a recommendation for a single board*). R.Doc. 432 (original date for filing objections was May 2, 1989). |
| 5/01/89 to 5/16/89 | Various objections to Special Master's report filed:<br>United States: R.Doc. 438.<br>State of Louisiana: R.Doc. 439 (*no objections to single board*) and R.Doc. 445 (response to objections raised by the United States and Southern).<br>Regents: R.Doc. 441.<br>Trustees: R.Doc. 436-437.<br>LSU: R.Doc. 440, R.Doc. 444 (response to objections raised by the United States and Southern).<br>Southern: R.Doc. 443 (objection to single board).<br>Grambling State University Alumni Association (GSUAA): R.Doc. 442. |
| 5/30/89 | Final report of Special Master (*including a recommendation for a single board*), R.Doc. 460. |
| 6/01/89 | Court ordered objections to Special Master's final report to be filed by June 12, 1989, R.Doc. 462. |

(Continued on following page)

Mr. Guste's next step in attempting to reverse the State's position on remedy was to bring this case before the United States Supreme Court. On August 11, 1989, Mr. Guste filed a "Motion for Stay Addressed to Individual Justice." The only other party filing an application for a stay in the Supreme Court was Southern. Simultaneous with his motion for a stay, Mr. Guste filed a Notice of Appeal to the Supreme Court and, on August 16, 1989, asked that Court to remove Mr. Kennedy, Mr. Levin, and

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| 6/12/89 to 6/23/89 | Various objections to Special Master's final report filed:<br><br>United States: R.Doc. 469, 473.<br>State of Louisiana: R.Doc. 475 (*no objection filed to the creation of a single board*).<br>Trustees: R.Doc. 467.<br>LSU: R.Doc. 464-465.<br>Southern: R.Doc. 468 (objection to single board).<br>GSUAA: R.Doc. 466. |
| 6/26/89 | Hearing on objections to final report, R.Doc. 480. |
| 7/19/89 | Opinion and Order adopting the Special Master's final report, R.Doc. 490. |
| 8/02/89 | Attorney General Guste filed his "Notice to Join," R. Doc. 499. |

Southern University, with whom the Attorney General is apparently now aligned, suggests as a reason for the Attorney General's lack of participation in these proceedings one that could at least be argued from the record (but one that he in fact does not argue), to wit: he was not concerned about remedy and was only interested in the liability phase of the case.

Ms. Calobrisi as counsel for the State. Thereafter, Mr. Guste filed his Jurisdictional Statement with the Supreme Court, purportedly on behalf of the State. A separate Jurisdictional Statement was filed jointly by the State through Governor Roemer and by Regents, Trustees, and LSU.

II.

Against this background, the Court must to assess who will represent the State's interests in this case. The Court concludes that (1) under both federal statutory and inherent federal judicial authority, it is a federal question for this Court to determine and resolve the right and manner of counsel participation before this Court; (2) due to his active and tacit acquiescence in the Governor's involvement, the Attorney General is judicially estopped from complaining, and he waived any right he might have had to complain, of the Governor's representation of the State in this case; (3) under Louisiana state law, the Governor, not the Attorney General, is the superior representative of the State's interests; and (4) alternatively, the Governor should be permitted to appear and participate as an amicus curiae.

A.

As a federal court of competent jurisdiction over this case under the Civil Rights Act and the Constitution, this Court has both the federal statutory and inherent judicial power to resolve who may be permitted to appear before it and how appearances before it may be conducted. *Compare Frazier v. Heebe*, 482 U.S. 641, 645, 107 S. Ct. 2607,

2611, 96 L.Ed.2d 557 (1987) (citing 28 U.S.C. § 1654) *with Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-66, 100 S. Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980)). Thus, neither state statutes nor state courts can be dispositive of any dispute over representation of a party in this federal court case. *See also Western Life Insurance Co. v. Nanney*, 296 F. Supp. 432, 440 (E.D. Tenn. 1969).

Once counsel have been designated and authorized to appear before a court in any proceeding, it is hornbook law, common practice, and has been uniformly held that such court (with any reviewing appellate courts) alone has the right thereafter to determine counsel and to permit substitution or addition of counsel. Specifically, courts are granted broad discretion to determine who shall practice before them in each particular case and to monitor their conduct. This is especially true when the conduct may directly impede the orderly administration of justice. *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619-20 (11th Cir. 1983); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S. Ct. 1133, 51 L.Ed.2d 556 (1977); *see Kleiner*, 751 F.2d at 1209. At times, a defendant's right to counsel "must yield to the higher interest of the effective administration of the courts." *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S. Ct. 86, 62 L.Ed.2d 56 (1979).

If courts did not have this power, attorneys could manipulate the court's docket to suit their tactical advantage. For example, as in this case, on the eve of the finality of judgment, irrespective of all the judicial time and expense previously incurred, a party could, by

removing counsel, attempt to thwart an expeditious resolution of the case.

The Court briefly addresses the Attorney General's conduct in filing on October 9, 1990, a suit in state court seeking to resolve by declaratory judgment the very same issues raised by the Attorney General's own motion before this Court in this very case. The Attorney General's state court suit has now been removed to this Court, assigned Civil Action No. 90-4109, transferred to this Section of Court, and consolidated with this case (Civil Action No. 80-3300). On October 24, 1990, the Attorney General filed a motion to remand, which the Court took under submission on the memoranda without oral argument.[5]

The Attorney General's thinly veiled attempt to deprive this Court of the jurisdiction to determine representation in this case must fail. *See also* 28 U.S.C. § 2283 ("A court of the United States may . . . stay proceedings in a State court . . . where necessary in aid of its jurisdiction). Because federal law and *this* federal court control such issues notwithstanding the Attorney General's contrary suggestion, the Governor's removal of Civil Action No. 90-4109 was proper under 28 U.S.C. § 1441.

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[5] Concurrent with his motion to remand, the Attorney General sought costs, expenses, attorneys' fees, and imposition of Rule 11 sanctions. The Attorney General's motion for sanctions is baseless and utterly without merit.

B.

The Attorney General's own actions in this case show his acquiescence in the Governor's representation of the State. The Attorney General generally failed to take an active role in the remedy phase of the case. Instead, he permitted the Governor and his lawyers, each of whom Mr. Guste moved into the case as the State's counsel, to conduct the State's defense. Having never objected to the Governor's representation of the State, the Attorney General should not now be allowed in effect to alter the State's position at the eleventh hour, after, as set out heretofore, the case was, for all practical purposes, completed at the trial level.

Having brought the Governor's counsel into the case, Mr. Guste should not then be allowed to replace those attorneys and the Governor, particularly while attempting to change the position of the State by opposing those critical aspects of the Remedial Order that the State had advanced at trial. *See Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988); *Mongoose Gin Co. v. United States*, 331 F.2d 483, 484 (5th Cir.) (new allegations, not raised before the trial court, may not be asserted as a basis for reversal of the trial court's judgment), *cert. denied*, 379 U.S. 833, 85 S.Ct. 65, 13 L.Ed.2d 41 (1964); *Christian v. Jemison*, 303 F.2d 52, 55 (5th Cir.) (defendants' failure to contest allegations *"prior to judgment"* prevents them from doing so after judgment is rendered (emphasis in original)), *cert. denied*, 371 U.S. 920, 83 S.Ct. 287, 9 L.Ed. 2d 229 (1962); *see also People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150, 155-56 172 Cal. Rptr. 478, 479-80, 624 P.2d 1206 (1981) ("no constitutional, statutory or ethical authority" existed to support the Attorney General for "acting adversely to

the position of his statutory clients [the Governor and the state agency]"). The equities against the Attorney General are especially compelling here where he offers no plausible explanation for his tardiness. *See Graddick v. Newman*, 453 U.S. 928, 936, 102 S. Ct. 4, 9, 69 L.Ed. 2d 1025 (1981) (Powell, J., in chambers) (refusing to grant the Alabama Attorney General's request for a stay of a federal district court order, where the governor maintained a different position and the Attorney General "moved with unexplained tardiness"); *see also Williams v. McKeithen*, Civil Action No. 71-98-B, Order (M.D. La. July 20, 1990) (ruling that Governor Roemer, and not Attorney General Guste, is the sole representative of the State in that case, which concerns a long-standing constitutional challenge to the policy and practices of the State's prison system).

Serious inconsistencies in Mr. Guste's arguments further support this conclusion. For example, in pleadings filed with the Supreme Court, Mr. Guste defended his appeal of this Court's Remedial Order and his request for stay of that Order by claiming that he "did not and *could not reasonably expect* that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered [by the trial court]." R.Doc. 545, at 11-12 (quoting Guste's Supersession Motion at 14) (emphasis added). This statement is misleading and could only by excused as a statement from someone who was not familiar with the conferences, the hearings before the Special Master, and the record generally. In 1988, this Court suggested on at least two occasions that a unified governing board was likely to be part of the remedy fashioned in this case. *See United States v. Louisiana*, 692 F. Supp. at 658; R.Doc. 295, Opinion and Order of Nov. 22,

1988. Since then, numerous documents have been filed in this case (and served on Mr. Guste) discussing the single board issue. *See* footnote 4 above. Additionally, overwhelming media attention was given to the proposed abolition of the four boards and the creation of a single board. All of these factors render Mr. Guste's assertions all the more incredible and highlight the propriety of estopping Mr. Guste from complaining of the Governor's representation of the State.

Further, Mr. Guste's explanation to the United States Supreme Court for his belated re-involvement in the case is inconsistent with the explanation he offered to this Court, namely, that he was duty-bound to provide a defense of the State's four board, 70-member governance structure, and the laws creating it. *See* R.Doc. 499, 507. Certainly, to the extent such a duty was present, it has existed since the beginning of the remedy phase of this case, months before Mr. Guste chose to re-enter the case.

This State's Rules of Professional Conduct require candor in an attorney's professional conduct. *See* LOUISIANA RULES OF PROFESSIONAL CONDUCT, RULES 3.3, 4.1, 8.4. The Local Rules of this Court adopt these State rules and provide that this Court may take appropriate action for, among other things, violations of the Louisiana Rules of Professional Conduct. *See* RULES OF DISCIPLINARY ENFORCEMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, RULE II. Rule II could thus arguably serve as the basis for the Court's ordering of Mr. Guste's withdrawal from this case based on a willful violation of such rule. At a minimum, such conduct forms a basis for holding that Mr. Guste is estopped from complaining of the Governor's representation of the State's interests.

Under 28 U.S.C. § 1654, a party in federal court is not permitted "hybrid representation," partly by counsel and partly by himself. *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir. 1978). By analogy, a party in federal court is not entitled to divergent counsel. Because the Court on the one hand holds that the Governor's attorneys may continue to represent the State and on the other hand finds that the Attorney General is at odds with the Governor in this case, an additional basis follows for holding that the Attorney General must discontinue to represent the State in this case.

C.

Even if this Court were to find that the Attorney General had not waived his rights herein as a matter of federal law, the Court would conclude that as a matter of Louisiana state law, the Governor, as head of the executive branch, is the primary representative of the State herein and, as such, may dictate the State's course in this litigation. *Cf. State of Louisiana ex rel. Guste v. Texaco, Inc.*, 433 So.2d 756 (La. App. 1st Cir. 1983) (upholding the Governor's interpretation of a state statute over the Attorney General's in a dispute between the State and a third-party), *appeal dismissed*, 453 So.2d 557 (La. 1984). This conclusion is based upon the 1974 Louisiana Constitution's clear designation of the Attorney General as a member of the executive branch of the government and,

as such, an executive officer inferior to the Governor.[6] *Accord Graddick*, 453 U.S. at 934, 102 S. Ct. at 8.[7]

Then recognition of the Governor's superior position is consistent with Louisiana case law under prior State constitution:

> The Louisiana Supreme Court on frequent occasions has construed Article VII, Section 56 [the Attorney General Clause under the 1921 Constitution], as not conferring an exclusive charge and control of all legal matters in which the state has an interest in favor of the Attorney General.

*State of Louisiana ex rel. Guste v. Louisiana Bd. of Highways*, 275 So.2d 207, 213 (La. App. 1st Cir. 1973), *aff'd*, 289 So.2d

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[6] Were the issue of representation in *this* Court solely a question of state law and were the state law not so clear, then *Burford* abstention by this Court might be appropriate. *Cf. also Massachusetts v. Feeney*, 429 U.S. 66, 97 S. Ct. 345, 50 L.Ed.2d 224 (1976) (certifying an similar but unclear issue to the Massachusetts Supreme Judicial Court). But neither condition is true in this case; thus, the Attorney General's reference to *Burford* is misplaced.

[7] In this regard, the instant case is virtually indistinguishable from *Graddick*. Governor Roemer has actively participated in the litigation as the representative of the State of Louisiana and all of its citizens, while the Attorney General has been noticeably inactive until most recently. Additionally, in Alabama, as in Louisiana, the attorney general is the state's chief legal officer under state law. *Compare* Ala. Code § 36-156-21 (1975) *with* La. Const. art. IV, § 8 (1974) *and* La. R.S. 49:21-22; *see also* La. Const. Art. VIII, § 5-7 (1974); La. R.S. 17:1453, 17:1831.

82 (La. 1974);[8] *see also Kemp v. Stanley*, 204 La. 110, 15 So.2d 1, 9 (1943); *Ricks v. Department of State Civil Service*, 200 La. 341, 8 So.2d 9, 59-60 (1942); *State ex rel. Strauss v. Dubuclet*, 25 La. Ann. 161 (1873).

Section 8, pertaining to the Attorney General and naming him "the chief legal officer of the state" was placed in Article IV of the 1974 Louisiana Constitution, on the executive branch of state government, rather than in Article V, on the judicial branch. Article IV, Section 5(A) designates the Governor as "the *chief* executive officer of the state" (emphasis added). Read in context, these sections provide that the Attorney General is an executive officer operating under the Governor. Thus, the Attorney General does not replace the Governor as spokesman for the State whenever the Attorney General attempts to enter a legal proceeding.

The history behind Section 8 confirms that its placement in the executive powers article was purposeful and has meaning. During the constitutional convention debate on the executive branch article, it was suggested

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[8] The Louisiana Constitution of 1921 contained the following language regarding the powers of the State's Attorney General:

> . . . They, or one of them [the Attorney General and his assistants], shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings, civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the State. . . .

La. Const. art. VII, § 56 (1921).

that even the introductory reference in Article IV, Section 8 to the Department of Justice and the Attorney General should be deleted and that all matters concerning both should be handled in Article V, on the judicial branch of the state government. *See* VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, CONVENTION TRANSCRIPTS [hereinafter "RECORDS-TRANSCRIPTS"), at 625-26, *reproduced in* R.Doc. 545, Exh. 11. The decision not to do that plus the later transfer of the provisions on the power of the Attorney General to the executive branch article, supports the conclusion that the Attorney General is and was meant to be part of the executive branch, which is headed by the Governor. The Attorney General *could* have been made a party of the judiciary, which is independent of the executive branch; in response to that suggestion, however, then-delegate Camille Gravel[9] stated quite clearly:

> No sir. I think that most of us agree that the Attorney General should be in the executive branch of government. In the previous discussion on that . . . , I believe the desire of this convention was to consider the functions of the Attorney General's office under the judiciary article but generally with an understanding that probably those functions would then be placed back in the executive article where we will have created, if this amendment passes, the department of justice within the executive branch.

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[9] Mr. Gravel had been executive counsel to the former Governor, was a top advisor to the Governor at the time, and worked with the then (and now) Attorney General Guste.

VI RECORDS-TRANSCRIPTS, at 626.

Another member of the Executive Committee, delegate (now U.S. District Judge) Tom Stagg, was even more candid. In alluding to the powers of the Attorney General, Judge Stagg stated that the Executive Committee

> debated what ought to be the powers that would adhere to that office for him effectively to be able to be the state's chief legal officer, to guard the rights of all of the people of the state, *without having [sic] him so much authority that he might become more than just the state's chief legal officer.*

VI RECORDS-TRANSCRIPTS, at 880 (emphasis added).

The phrase "chief legal officer" first appeared in the proposal submitted to the convention by the Committee on the Executive Branch ("Executive Committee"), which was charged with the responsibility of drafting the 1974 constitution's provisions on the executive branch of the Louisiana state government. *See* 1 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, JOURNAL OF PROCEEDINGS [hereinafter "RECORDS-JOURNAL"] 95, *reproduced in* R.Doc. 545, Exh. 9; Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV 765, 834 (1977), *reproduced in* R.Doc. 545, Exh. 10. The Executive Committee's comments to its proposal simply stated without further explanation that "[t]he attorney general is made the state's 'chief legal officer.' " *See* 1 RECORDS-JOURNAL, at 95; *see also* Hargrave, at 934 n.306. The convention's Judiciary Committee also proposed a section to govern the Attorney General; that proposal did not contain the "chief legal officer" language, but instead merely

used the language of the prior constitution. *See* 1 RECORDS-JOURNAL, at 100.

The Executive Committee's proposal concerning the Attorney General reached the convention floor before the proposal of the Judiciary Committee, since the Executive Committee's proposals were part of the overall provisions on the executive branch. However, to avoid protracted debate, part of which involved the proper jurisdiction of the committees, the convention voted to delay consideration of the powers of the Attorney General. *See* VI RECORDS-TRANSCRIPTS, at 624-26; *see also* Hargrave, at 831. Mr. Gravel, a member of the Executive Committee, proposed an amendment that deleted the Executive proposal's reference to the Attorney General's powers and instead simply provided that "[t]here shall be a department of justice, headed by the attorney general who shall be the state's chief legal officer." Explaining his proposal, Mr. Gravel stated:

> [A]ll that this does is to create the department of justice within the executive department and to constitutionally declare that the Attorney General shall be the head of that department and the state's chief legal officer. *All of the matters relating to the functions, powers and duties of the department and of the office of Attorney General will be relegated to future consideration when we consider the judiciary article.*

VI RECORDS-TRANSCRIPTS, at 625 (emphasis added); *see* Hargrave, at 821 n.292.

The reference to "chief legal officer" thus remained, but, as the comment from Mr. Gravel indicates, only as an introductory expression without substantive meaning with regard to powers, functions or duties. The "chief

legal officer" language, which is now the first paragraph of Section 8, merely establishes the department of justices and the fact that its head, *i.e.*, "the chief legal officer of the state," is the Attorney General. The specifics of the Attorney General's powers were to be (and were in fact) handled later when the Judiciary Committee's proposal was considered.

Once the consideration of the powers of the Attorney General was completed upon debate of the Judiciary Committee's proposal, the introductory paragraph in Article IV, Section 8 containing the "chief legal officer" language was followed by two specific categories of powers in two specific paragraphs. The first such paragraph (the second paragraph in Section 8) specifies the constitutional powers granted to the Attorney General and also limits those specified powers. The second such paragraph (the third paragraph in Section 8) leaves to the Legislature (and to other constitutional provisions) the determination of the "other powers" and "other duties" of the office. *See* IX RECORDS-TRANSCRIPTS, at 3377-81; Hargrave, at 831. None of those provisions requires this Court to allow Mr. Guste's position to predominate over the Governor's.

In sum, the state constitution's designation of the Attorney General as "the chief legal officer of the state" must be read in conjunction with its designation of the Governor as "the chief executive officer of the state" with authority over all other executive officers, including the Attorney General.[10] The issue is who establishes policy

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[10] Article IV, Section 1(A) of the 1974 Constitution was also amended to list the Attorney General as the member of the

(Continued on following page)

for the State in this litigation, not who is the real client, as Mr. Guste would have the Court frame the issue. In sum, the language in the constitution regarding the State's Attorney General confers no substantive or overall supervisory power on that office, as Mr. Guste would claim.

To supersede an attorney for the State, as Mr. Guste has attempted to do before this Court as well as the United States Supreme Court, the Attorney General must establish "cause." La. Const. art. IV, § 8.[11] The drafters of Louisiana's current constitution discussed the meaning of "cause." The records of the constitutional convention are replete with references to the need for some kind of misconduct or failure to act in order to justify the supersession. *See* VI RECORDS-TRANSCRIPTS, at 902-14; *see also* Hargrave, at 835-36. "Cause" in essence means that the attorney "is not fulfilling his duties satisfactorily." Hargrave, at 835; *Plaquemines Parish Commission Council v. Perez*, 379 So.2d 1373, 1377 (La. 1980). There is absolutely

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(Continued from previous page)

executive branch, although the Attorney General had been omitted at one point. Article IV, Section 1(A) provides that "[t]he executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, and all other executive officers, agencies, and instrumentalities of the state." La. Const. Art. IV, § 1(A).

[11] Section 8 provides in pertinent part that "the attorney general shall have authority . . . for cause, when *authorized by the Court which would have original jurisdiction* and subject to judicial review, . . . to supersede any attorney representing the state in any civil . . . action" (emphasis added).

no basis in the record before the Court for a finding that the Governor's counsel have failed to perform their duties properly or have failed to properly research the law.[12] Rather, their work has been of consistently high caliber. Thus, the Court perceives the local dispute as one of power, to shape policy regarding an appropriate remedy. In summary, the Court must reject as lacking in legal support Mr. Guste's efforts to have his choices predominate over those of the Governor.

D

A federal district co ɔossesses the inherent authority to appoint an amicus curiae to assist the court in its proceedings. *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D. Mich. 1987); *cf. Morales v. Turman*, 820 F.2d 728, 731 (5th Cir. 1987). The privilege of being heard amicus rests solely within the discretion of the court. *Leigh v. Engle*, 535 F.Supp. 418, 420 (N.D. Ill. 1982); *accord U.S.F.&G. Co. v. Victory Land Co.*, 410 So.2d 359, 361 (La. App. 4th Cir.), *writ denied*, 412 So.2d 1113 (La. 1982); *Parent-Community Alliance for Quality Education, Inc. v. Orleans Parish School Bd.*, 385 So.2d 33, 34 (La. App. 4th Cir.), *writ denied*, 386 So.2d 1379 (La. 1980). Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence. *Michigan*, 116 F.R.D. at 660-61; *cf. Morales*, 820 F.2d at 731. There are no strict prerequisites that must be established

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[12] Indeed, in his letters of "dismissal"directed to Mr. Kennedy, Mr. Levin, and Ms. Calobrisi, Mr. Guste commended their performance. *See* R.Doc. 545, Exh. 14.

prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court. *Leigh*, 535 F.Supp. at 420; *cf. New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). Absent a statute to the contrary, no distinction is made between the request of a private person for leave to appear amicus and one by an agent of the government. *Leigh*, 535 F. Supp. at 420; *see Braddy v. Southern Bell Telephone & Telegraph Co.*, 458 F.2d 666, 668 (5th Cir. 1972).

That the Governor's continued involvement in this case would prove useful to the Court and the State of Louisiana is an understatement. Throughout this litigation, Governor Roemer has actively and consistently participated as the representative of the State and its citizens. In contrast, the Attorney General has been passive and inconsistent, to the point of being disrespectful of this Court's jurisdiction through his effort to litigate these issues in state court in an attempt to circumvent this Court's inherent power to supervise the appearance of attorneys.

Louisiana's system of public higher education and all of its colleges and universities are at stake. Included in the powers conferred upon the Governor as the State's chief executive officer is the responsibility to appoint the members of the various bodies charged with the management of the State's public higher education system, a duty that is at the very core of this case. *See, e.g.*, La. Const. art. VIII, §§ 5-7; La. R.S. 17:1453, 17:1831-1832, 17:1851-1852, 17:3121-3122. In addition to the duties and powers conferred by the State's constitution and statutes,

the Remedial Order vests the Governor with the responsibility and authority to appoint the voting members of the single state governing board mandated in the Remedial Order. Thus, the Governor clearly possesses substantial legal interests and powers deserving the protection in the remaining stages of this case. Therefore, even if an appellate court were to rule that the Governor through his counsel may not represent the State in this case, this Court would permit the Governor to appear as an amicus curiae.

While the basis for permitting the Attorney General to remain in this case is slim, the Court nonetheless holds that he may participate in this case hereinafter as an amicus curiae, just like GSUAA.

III.

For these reasons, the Court holds that John N. Kennedy and Joseph J. Levin Jr. are designated the State's sole attorneys in this case and that the Attorney General may participate as an amicus curiae only.

The issuance of this Order necessarily determines the entirety of the Attorney General's declaratory judgment suit; thus, the Court now DENIES all relief in that suit. Nothing herein, however, shall be construed to prevent the Attorney General from litigating his right to appear as a representative of the State in a matter not involving these proceedings.[13]

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[13] Although the Attorney General uses broad language in his supporting memoranda, his complaint in his Petition for

(Continued on following page)

The Clerk of Court is directed to enter a Judgment in accordance herewith.

New Orleans, Louisiana, this 30th day of October, 1990 at 2:00 P.M.

/s/ Charles Schwartz. Jr.
UNITED STATES DISTRICT JUDGE

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(Continued from previous page)

Declaratory Judgment and Injunction Relief is the conduct of Governor Roemer, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi *solely* in connection with this case. To the extent the Attorney General would seek to adjudicate the issue of representation in future possible actions, his request would not yet present a justiciable case or controversy; thus, to any such extent, his declaratory judgment suit would be dismissed as premature.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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| UNITED STATES OF AMERICA | Civil Action |
| VERSUS | No. 80-3300 |
| STATE OF LOUISIANA, ET AL., | Section "A" |
| | FILED OCT 30 '90 |

JUDGMENT

Considering the Court's Order of October 30, 1990,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that there is judgment against plaintiff (the United States of America) and in favor of all the defendants, dismissing the plaintiff's complaint with prejudice. Each party shall bear its own costs and attorney's fees.

New Orleans, Louisiana, this 30th day of October, 1990 at 2:40 p.m.

/s/ Loretta G. Whyte
CLERK OF THE COURT

Approved as to form:

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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| UNITED STATES OF AMERICA | Civil Action |
| VERSUS | No. 80-3300 |
| STATE OF LOUISIANA, ET AL., | Section "A" |
| | FILED OCT 30 '90 |

ORDER

Notwithstanding factual distinctions between Louisiana's and Mississippi's public higher education systems, *see, e.g., United States v. Louisiana*, 692 F. Supp. 642, 656 n.69 (E.D. La. 1988), and respectfully disagreeing with the majority's conclusion in *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (en banc), this Court nonetheless finds that *Ayers* is both binding and controlling in this cause and that, under *Ayers*, there are no disputed material facts left for this Court to resolve.[1] Accordingly, the Court VACATES its Order of August 2, 1988,[2] DENIES summary

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[1] This conclusion is based on the Court's familiarity with every aspect of this litigation including the affidavits, testimony, and depositions taken in connection with all proceedings herein including such in motions for summary judgment, proceedings and testimony before the Special Master, all representations made at all hearings, and all of the parties' submissions to the Court.

[2] This Court construes the Fifth Circuit's remand order to permit this vacation, whether as reconsideration of an interlocutory order or as appropriate relief under F.R.Civ.P. 60(b)(6) to a final order. *Cf. Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 & n.3 (5th Cir. 1976).

judgment in favor of the United States, GRANTS summary judgment in favor of all defendants, and DIRECTS the Clerk to enter herewith final judgment in accordance with this Order.[3] Each party shall bear its own costs and attorney's fees.

Had this Court a clean, or at least pre-*Ayers* (en banc), slate, the Court would not vacate its Order herein of August 2, 1988 and would enter a remedial order in the form of "Revised Exhibit A" attached to the Order and Reasons issued this date. Thus, if the judgment entered herewith is reversed on appeal, that proposed remedial order should be considered the Order of this Court without the necessity of a remand.

New Orleans, Louisiana, this 30th day of October, 1990, at 2:29 p.m.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

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[3] As this Court reads the *Ayers* opinion: absent a discriminatory intent, different mission designations may limit the program and scope of various universities. Thus, a State is not required to fund all educational institutions at the same level or to fund any particular one at any particular level. Therefore there is no basis whatsoever for this Court to retain any further jurisdiction. of this case.

## ARTICLE IV. EXECUTIVE BRANCH

### § 1. Composition; Number of Departments; Reorganization

Section 1. **(A) Composition**. The executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, commissioner of elections, and all other executive offices, agencies, and instrumentalities of the state.

### § 3. Election; Term

Section 3. **(A) Election.** Except as provided in Section 20 of this Article, the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, and commissioner of elections each shall be elected for a term of four years by the electors of the state at the time and place of voting for members of the legislature. The term of each such official shall begin at noon on the second Monday in January next following the election.

**(B) Limitation on Governor**. A person who has served as governor for more than one and one-half terms in two consecutive terms shall not be elected governor for the succeeding term.

### § 5. Governor; Powers and Duties

Section 5. **(A) Executive Authority.** The governor shall be the chief executive officer of the state. He shall

faithfully support the constitution and laws of the state and of the United States shall see that the laws are faithfully executed.

**(H) Appointments.**

(1) The governor shall appoint, subject to confirmation by the Senate, the head of each department in the executive branch whose election or appointment is not provided by this constitution and the members of each board and commission in the executive branch whose election or appointment is not provided by this constitution or by law.

**(I) Removal Power.** The governor may remove from office a person he appoints, except a person appointed for a term fixed by this constitution or by law.

**§ 8. Attorney General; Powers and Duties**

Section 8. There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall selected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to service at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute,

prosecute, or intervene in any criminal action or proceeding, or (b) to supersede and attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

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**R.S. 13:5036. Suits for protection of state's interests and rights; institution and prosecution by attorney general; costs; bond**

The attorney general may institute and prosecute any and all suits he may deem necessary for the protection of the interests and rights of the state. No court of this state, nor officer thereof, shall demand of the state, or the attorney general, any security for costs, or any advance costs; but all costs for which the state may become liable shall be paid by the attorney general out of the proper appropriation therefor. In any and all cases where bond is required by law in legal proceedings, the state and the attorney general shall be dispensed from giving such bond.

**R.S. 49:257(B). Legal representation of certain state agencies**

* * *

B. Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in

any action or proceeding in which the constitutionality of a state statute or of a resolution of the Legislature is challenged or assailed.

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No. 21.]

AN ACT

To limit and define the duties and powers, fees and emoluments of the Auditor of Public Accounts and other ministerial officers of the State, and to prohibit them from instituting or defending actions, suits, writs, or other process for or against the State, and from employing counsel and incurring costs of court, attorneys' fees and other unnecessary expenses to the State, and to define the duties and powers of the Governor, the Attorney General, the district attorneys and the courts of the State in certain cases.

WHEREAS, It appears that the Auditor of Public Accounts and other ministerial officers have, without authority of law, incurred great and unnecessary expenses to the State, and impaired the credit of the State by various and unnecessary litigation; and

Whereas, The Constitution and laws have made proper and sufficient provision for the institution, maintenance and defense in the courts of the State of all actions, suits, writs, or other legal process instituted or to be instituted in behalf of or against the State, or in behalf of or against any of the officers of the State in their respective official capacities; and

Whereas, The organic law and sound public policy require and designate that the powers and duties of the co-ordinate branches of the State government should be maintained distinct and separate, the executive, the legislative, and the judiciary, as set forth in the Constitution; and

Whereas, The several district attorneys, in and for their respective districts, are the proper officers designated by the Constitution as counsel for the State and for officers of the State in their official capacities; and

Whereas, The Attorney General is the chief law officer of the State, and the constitutional adviser and counsel of the Auditor of Public Accounts, the State Treasurer and other ministerial officers of the State, and authorized and required to institute, defend and control all suits, writs, actions and other legal process in behalf of or against such ministerial officers, in their respective official capacities; and

Whereas, The Attorney General and the district attorneys are paid by the State large salaries for the performance of such duties as pertain to their respective offices, and the public have a right to their services in return, and, together with the judiciary, they have the exclusive right to determine and pass upon all constitutional and legal questions arising out of any contract or proceedings or otherwise, wherein the State may be interested, directly or indirectly, or wherein any public officer may be called upon to act in his official capacity; and

Whereas, The Governor of the State, as the chief executive, charged to see the laws faithfully executed, has the right, in case of the absence, death, resignation or

inability to act in any particular case of the Attorney General, or proper district attorney, or where either of them may be directly interested, a right to designate an attorney for, such case to act in behalf of the State, for the protection of the public interest.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That hereafter it shall not be lawful for the Auditor of Public Accounts, the State Treasurer, or other ministerial officers of the State, to be or appear in any court of the State, either in person or by private counsel, to institute, maintain, defend, prosecute, or in any manner interfere, or attempt to control any suit, writ, or other legal process (except criminal proceedings) which may be brought against him in his official capacity, or in which the State may be interested, directly or indirectly, or be in any wise a party; but in all such cases the papers shall be served, if the action be instituted in the parish of Orleans, on the Attorney General, and if in any other parish, on the proper district attorney or district attorney *pro tempore,* and such officer shall thereupon have sole charge of the conduct of such action; *provided,* that the Governor or the Attorney General may, in any case of necessity, designate an attorney-at-law to assist the attorney of State, or in case of his absence or inability to act, or if he be unwilling or interested, to take charge of such case, with power to act. And it shall be the duty of the Auditor of Public Accounts, the State Treasurer and other ministerial officers of the State, or persons charged with the execution of any State contract, or act enjoined by law, or pertaining to the duties of his station, on application, or if he have doubt as to the proper course to be pursued, to

refer the matter, with all information in his possession, to the Attorney General of the State.

SEC. 2. *Be it further enacted, etc.*, That hereafter it shall not be lawful for any court of the State to entertain, or maintain, or recognize any action, suit, writ, or other legal process, nor any pleading in any case wherein the Auditor of Public Accounts, the State Treasurer, or any other ministerial officer, appear as a party to the record, either in person or by private counsel, but all such proceedings shall be refused or dismissed (either *ex officio* or on motion) as in case of non-suit, without prejudice to the rights of parties interested; *provided*, that in every such case the officer thus unlawfully appearing shall be condemned to pay the costs of suit therein; and *provided further*, that notice of such dismissal shall be served on the Attorney General, or proper district attorney, who may, on motion, reinstate and maintain such action as it stood at the moment of dismissal, without prejudice to the rights of parties interested, if he deem it expedient so to do.

SEC. 3. *Be it further enacted, etc.*, That hereafter it shall be unlawful for the Auditor of Public Accounts to demand, receive or accept any other fees, rewards, compensation or salary than the salary of five thousand dollars per annum allowed by the Constitution, and such amount for clerk hire, contingent expenses and office rent as may be allowed by law, not exceeding in the aggregate twenty thousand dollars per annum; *provided*, that nothing in this act shall be construed to relieve the Auditor of Public Accounts from the performance of such duties, within his office, as are now required by law for the public convenience.

SEC. 4. *Be it further enacted, etc.*, That in every case in which process issues from any court against the Auditor of Public Accounts, or any other ministerial officer of the State, service shall also be made on such officer, and he shall be amenable, as heretofore, to all process of court, and subject to punishment for any violation of any order, writ or judgment, as now provided by law, and such further punishment as the court may deem necessary to maintain its jurisdiction and enforce its mandates.

SEC. 5. *Be it further enacted, etc.*, That this act shall take effect from and after its passage, and all laws or parts of laws conflicting herewith are hereby repealed.

(Signed) O. H. BREWSTER,
Speaker of the House of Representatives.
(Signed) P. B. S. PINCHBACK,
Lieutenant Governor and President of the Senate.
Approved March 6, 1872.
(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.
A true copy:
F. J. HERRON,
Secretary of State.

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## ARTICLE VIII. EDUCATION

### Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may

be afforded an equal opportunity to develop to his full potential.

* * *

**§ 5. Board of Regents**

Section 5. **(A) Creation; Functions.** The Board of Regents is created as a body corporate. It shall plan, coordinate, and have budgetary responsibility for all public higher education and shall have other powers, duties, and responsibilities provided in this Section or by law.

**(B) Membership; Terms.** The board shall consist of fifteen electors appointed by the governor, with consent of the Senate, for overlapping terms of six years, following initial terms which shall be fixed by law. At least one member, but no more than two members, shall be appointed from each congressional district.

**(C) Vacancy.** A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

**(D) Powers.** The Board of Regents shall meet with the State Board of Elementary and Secondary Education at least twice a year to coordinate programs of public elementary, secondary, vocational-technical, career, and higher education. The Board of Regents shall have the following powers, duties, and responsibilities relating to public institutions of higher education:

(1) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

(2) To approve, disapprove, or modify a proposed degree program, department of instruction, division, or similar subdivision.

(3) To study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed, the Board of Regents shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To formulate and make timely revision of a master plan for higher education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education.

(5) To require that every higher education board submit to it, at a time it specifies, an annual budget proposal for operational needs and for capital needs of each institution under the control of each board. The Board of Regents shall submit its budget recommendations for all institutions of higher education in the state. It shall recommend priorities for capital construction and improvements.

**(E) Powers Not Vested.** Powers of management over public institutions of higher education not specifically vested by this Section in the Board of Regents are reserved to the Board of Supervisors of Louisiana State

University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and any other such board created pursuant to this Article, as to the institutions under the control of each.

### § 6. Board of Trustees for State Colleges and Universities

Section 6. **(A) Certain; Functions.** The Board of Trustees for State Colleges and Universities is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities not managed by a higher education board created by or under this Article.

**(B) Membership; Terms.** The board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

**(C) Vacancy.** A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

## § 7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Board of Supervisors of Southern University and Agricultural and Mechanical College

Section 7. **(A) Creation; Powers.** The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested by this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

**(B) Membership; Terms.** Each board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

**(C) Vacancy.** A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

## § 8. Boards; Membership; Compensation

Section 8. **(A) Dual Membership.** No person shall be eligible to serve simultaneously on more than one board created by or pursuant to this Article.

**(B) Student membership.** The legislature may provide for the membership of one student on the boards

created by Sections 5, 6 and 7 of this Article. The term of a student member shall not exceed one year, and no student member shall be eligible to succeed himself. A student member shall have all of the privileges and rights of other board members.

**(C) Compensation.** A member of a board created by or pursuant to this Article shall serve without pay, but per diem and expenses may be provided by law.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>STATE OF LOUISIANA, *et al.*,<br>Defendants. | Civil Action<br>No. 80-3300<br>Section "A" |

AFFIDAVIT

I, William J. Guste, Jr., on oath depose and say that I am the duly elected Attorney General of the State of Louisiana and as such, I am the chief legal officer of the State.

I have represented the State of Louisiana in the higher education desegregation case herein since the complaint was filed against Louisiana by the United States Government in 1974.

On January 18, 1989, through an assistant, I filed a motion to enroll John Kennedy, the Governor's Special Counsel, together with two counsel contracted for by the Governor's Office, Joseph Levin and Carla Calobrisi, as additional counsel for the State of Louisiana and designated Kennedy as "Trial Attorney."

I permitted the enrollment of the Governor's counsel as an accommodation to the Governor so as to allow him to tender whatever remedial ideas he had to the Court. Throughout the remedial stage of these proceedings, however, it was my firm belief, and it remains my firm

belief, that it is beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure which is protected by Louisiana's Constitution.

Whatever the Governor's policy position, it is my sworn duty as Attorney General to defend Louisiana's Constitutional and statutory provisions against judicial orders that impinge upon Louisiana's sovereignty. I intend to do so.

It was not my intention in permitting the enrollment of the Governor's special counsel to waive my professional legal judgment or my constitutional duty as Attorney General of Louisiana regarding Louisiana's multiple-board system of higher education. Nor have I ever given consent to the abolition of our State's multiple-board system by federal judicial decree, as does the Governor's special counsel.

The minute entry of the District Court of August 1, 1989, threw into doubt Southern University's standing to challenge this Court's decision on State Constitutional and statutory grounds. For this reason, I immediately filed a Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel of August 11, 1989, so as to make it perfectly clear that my office, and my office alone, would manage the State's appeal of the District Court's orders herein.

Thereafter, I filed an appeal to both the United States Supreme Court and the Fifth Circuit, and I filed an application for a stay in the Supreme Court of the United States, all of which was opposed by the Governor's special counsel, who moved to dismiss the State's appeal, *ex*

*rel.* Guste, in the Supreme Court and who opposed the State's application, *ex rel.* Guste, for a stay order, which was granted by the Supreme Court on August 18, 1989.

I have personally initiated a meeting with Governor Roemer in his office explaining my position regarding my duties and my actions in this matter. I have explained to him that I have no objection to the Governor appearing as *amicus curiae* on appeal of the District Court's orders so as to allow him to express his policy in support of the District Court's judgment on remedy. I have also told him that I have my constitutional responsibilities under my oath of office as Attorney General of Louisiana. In fact, I proposed such an *amicus* procedure in a spirit of compromise by letters to Governor Roemer dated September 29, 1989 and December 21, 1989 (copies attached hereto as Exhibit B), and in a personal meeting with the Governor.

This statement by me has been prepared at my direction. It has been read to me by my Administrative Assistant, Stella L. Lomando, and I have affirmed and sworn by telephone to Dale C. Wilks, Notary Public, that it is true and correct, and I have authorized my Administrative Assistant, Stella L. Lomando, to sign my name hereto.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 26th day of October, 1990, at New Orleans, Louisiana.

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL OF LOUISIANA

/s/ Dale C. Wilks
NOTARY PUBLIC

APPENDIX A

State of Louisiana
DEPARTMENT OF JUSTICE
Baton Rouge
70804
September 29, 1989

Honorable Buddy Roemer
Governor, State of Louisiana
State Capitol
Baton Rouge, Louisiana 70804

Dear Governor Roemer:

It is vital that Louisiana present as united a front as possible in the higher education desegregation case now before the Supreme Court. I, therefore, want to avoid what would be an unseemly struggle between your office and mine regarding representation of the State's interests before the Supreme Court.

It would be appreciated very much if you will meet with me as soon as possible (Tuesday coming). I want to work out a mutually satisfactory arrangement regarding representation of the State's positions, including yours, before the Supreme Court.

It is my hope that we can reach an agreement that is satisfactory to both of us. If this were possible, I could withdraw the motion to supersede your counsel that I have filed in the Supreme Court. The issues before the Court in the desegregation case are too important in their own right to be clouded by a jurisdictional fight between our offices at the bar of the Supreme Court.

Sincerely,

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.

WJG, Jr-sl

cc: John N. Kennedy
P.J. Mills

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EXHIBIT "B"

(SEAL)

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE 70804 Telephone: 504-342-7013

December 21, 1989

Charles "Buddy" Roemer
Governor
State of Louisiana
4th Floor
State Capitol Building
Baton, Rouge, Louisiana 70804

RE: State of Louisiana, ex rel William J. Guste, Jr., Attorney General for the State of Louisiana vs. United States of America
#89-556

Dear Governor Roemer:

The Supreme Court will have a conference on Louisiana's higher education desegregation case on Friday, January 5, 1990.

I want to repeat my suggestion that it is vital that Louisiana present as united a front in the Supreme Court as possible.

As I mentioned before at our meeting in your office I would be happy to withdraw my motion to supercede counsel for the State of Louisiana conditioned upon your willingness to appear in this case as amicus curiae.

You mentioned when we met that you wanted to think this matter over. I hope that you agree with my suggestion at this time. May I please hear from you as soon as possible as time is of the essence.

Best holiday wishes,

WILLIAM J. GUSTE, JR.
Attorney General

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

AFFIDAVIT

BEFORE ME, the undersigned notary public, personally came and appeared Winston G. DeCuir who after being duly sworn did depose and say that, from October 1975, through January of 1989 he was employed by the Attorney General's office as an attorney in various capacities, particularly during the years 1987, 1988, and 1989 he was an Assistant Attorney General and chief of the education section of the Louisiana Department of Justice. As such affiant was in charge of organizing the State's legal effort in all areas of education and particularly in the area of higher education. Affiant further deposed that he is familiar with the litigation entitled *United States of America v. State of Louisiana* Civil Action No. 80-3300, United States District Court, Eastern District of Louisiana; and that during the period between 1987, and January of 1989 he was enrolled as attorney for the State of Louisiana in said litigation; during that period he attended and participated in all status conferences held before the court, and the various negotiations sessions between the United States of America and the various State defendants. Pursuant to the orders of the Court and the motions of the parties, Affiant further deposed that on behalf of the State of Louisiana and the Louisiana Board of Elementary and Secondary Education he did prepare and file with the court documents and memorandum opposing the Motion for Summary Judgment Board of Regents. Said memoranda and documents were prepared solely and exclusively under Affiant's direction within the office of the Attorney General by Affiant and members of the staff of

the Louisiana Attorney General. Affiant further deposed and said that John N. Kennedy played no part in the preparation of these documents but was allowed to sign the documents as special counsel to the Governor of Louisiana as an accommodation. At all times during the proceedings the interest of Louisiana and Louisiana Board of Elementary and Secondary Education was represented by the Louisiana Attorney General's office.

Sometime after Charles E. "Buddy" Roemer, III, was elected Governor; but before his appointed special counsel John N. Kennedy was enrolled as counsel for the State in January of 1989, John N. Kennedy began to attend some of the court's status conferences in the case and was allowed by the District Court to voice and advocate the positions and policies of the Governor. During the time period, however, he neither represented nor was enrolled as counsel of record for the State of Louisiana or any other actual party to the litigation.

Some months after the entry of the court's Order and Reasons for Summary Judgment, in August of 1988, Mr. John Kennedy acting on behalf of the Governor of the State of Louisiana, requested that Affiant approach the Attorney General to allow Kennedy and other counsel to enroll as additional counsel in these proceedings in order that they may appear and present the position of the Governor on the issue of liability filed by the United States of America and supporting the Motion for Summary Judgment filed by the Louisiana Board of Regents. Said memoranda and documents were prepared solely and exclusively under Affiant's direction within the office of the Attorney General by Affiant and members of the staff of the Louisiana Attorney General. Affiant further

deposed and said that John N. Kennedy played no part in the preparation of these documents but was allowed to sign the documents as special counsel to the Governor of Louisiana as an accommodation. At all times during the proceedings the interest of Louisiana and Louisiana Board of Elementary and Secondary Education was represented by the Louisiana Attorney General's office.

Sometime after Charles E. "Buddy" Roemer, III, was elected Governor; but before his appointed special counsel John N. Kennedy was enrolled as counsel for the State in January of 1989, John N. Kennedy began to attend some of the court's status conferences in the case and was allowed by the District Court to voice and advocate the positions and policies of the Governor. During the time period, however, he neither represented nor was enrolled as counsel of record for the State of Louisiana or any other actual party to the litigation.

Some months after the entry of the court's Order and Reasons for Summary Judgment, in August of 1988, Mr. John Kennedy acting on behalf of the Governor of the State of Louisiana, requested that Affiant approach the Attorney General to allow Kennedy and other counsel to enroll as additional counsel in these proceedings in order that they may appear and present the position of the Governor in the remedy phase of this litigation. This request was consented to in December of 1988 and a Motion to Enroll Additional Counsel on Behalf of the State was filed in January of 1989 by the Attorney General's office. At all stages of the litigation the office of the Attorney General represented the State of Louisiana and was active in all phases of said litigation with the single

exception that the Attorney General did not offer a separate State plan for higher education during the remedial phase of this matter.

The Affiant further deposed that prior to his entry into this litigation in 1987 the State of Louisiana was represented by Assistant Attorney Generals Kendall Vick and Paul Falitta.

/s/ Winston DeCuir
Winston DeCuir

Sworn to and subscribed before me this 8th day of October, 1990.

/s/ David G. Sanders
NOTARY PUBLIC

BUDDY ROEMER

March 9, 1988

The Honorable Charles Schwartz
Judge, United States District Court
for the Eastern District of Louisiana
Room C-255 (Filed MAR 10 1988)
500 Camp Street
New Orleans, LA 70130

Re: *United States of America v. State of Louisiana, et al.*, Civil Action Number 80-3300 "A", United States District Court for the Eastern District of Louisiana.

Dear Judge Schwartz:

Regarding the captioned matter, I represent Governor-Elect Buddy Roemer, Governor-Elect of the State of Louisiana.

In response to your minute entry of March 1, 1988, and pursuant to my telephone conversation of March 8 with Ms. Monachino, your law clerk, I ask that my name be added to your mailing list for this case. My address is as follows:

John N. Kennedy
Special Counsel to the Governor
Office of the Governor
State of Louisiana
Post Office Box 94004
Baton Rouge, Louisiana 70804
Telephone: (504) 342-7015

Thank you very much for your time and assistance in this matter.

Sincerely,

/s/ John N. Kennedy
John N. Kennedy
Legal Counsel
to the Governor-Elect

JNK:bj

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS CIVIL ACTION NO. 80-3300A
STATE OF LOUISIANA, ET AL

MOTION TO ENROLL ADDITIONAL COUNSEL OF RECORD

Now comes Winston G. DeCuir, attorney for the State of Louisiana, who moves the court to enroll the following persons as additional counsel of record for the State of Louisiana in the above captioned matter:

1.

The State moves that John N. Kennedy, Special Counsel to the Governor, Office of the Governor, State Capitol, 4th Floor, Post Office Box 94004, Baton Rouge, Louisiana 70804; Bar Number 7782 be enrolled as counsel of record. Mr. Kennedy is a member of this court and eligible to be enrolled as additional counsel under the rules of this court;

2.

The State moves that Joseph J. Levin, Jr. Attorney at Law, 2000 M. Street N.W., Washington, D.C., 20036-3307, Washington, D.C. Bar Number 147249 be enrolled as additional counsel of record for the State of Louisiana; attached hereto and made a part hereof are affidavits of Joseph J. Levin, Jr. indicating that he is a member of the bar of the State of Alabama and the District of Columbia

in good standing and that no disciplinary or criminal proceedings have been instituted against him. Additionally an affidavit of good standing from the United States District Court for the District of Columbia is attached hereto as required by Rule 21.5 of this court.

3.

The State moves that Carla Calobrisi, Attorney at Law, 2000 M Street, N.W., Washington, D.C., 20036-3307, Washington, D.C. Bar Number 398021 be enrolled as additional counsel of record for the State of Louisiana; attached hereto and made a part hereof is the affidavit of Carla Calobrisi, indicating that she is a member in good standing of the bar of the State of Virginia and the District of Columbia and that no criminal or disciplinary proceedings are pending against her. Additionally attached hereto is the affidavit of good standing of Carla Calobrisi executed by the Deputy Clerk for the United States District Court for the District of Columbia as required by Rule 21.5 of this Court.

4.

The State further moves that John N. Kennedy and Joseph Levin, Jr., be designated trial attorneys for the State of Louisiana pursuant to Rule 2.3 and that Winston G. DeCuir be designated resident attorney.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Winston G. DeCuir
WINSTON G. DeCUIR
Assistant Attorney General

LOUISIANA DEPARTMENT
OF JUSTICE
Post Office Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
STATE OF LOUISIANA, ET AL

CIVIL ACTION NO. 80-3300

ORDER

Considering the above and foregoing motion.

IT IS ORDERED that John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi be enrolled as additional counsel of record for the State of Louisiana,

IT IS FURTHER ORDERED that John N. Kennedy be designated as trial attorney for the State of Louisiana and that Winston G. DeCuir remain designated as local attorney for the State of Louisiana.

New Orleans, Louisiana, this 20th day of January, 1989.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon the following counsel by depositing same in U.S. Mails, postage prepaid, addressed as follows:

William Jefferson, Esq.
Jefferson, Brian and Gray
650 Poydras Street
Suite 1850
New Orleans, Louisiana 70130

Robert Kutcher, Esq.
Bronfin, Heller, Steinberg
and Berins
650 Poydras Street
Suite 2500
New Orleans, Louisiana 70130

W.S. McKenzie, Esq.
Taylor, Porter, Brooks & Phillips
451 Florida Blvd.
Baton Rouge, Louisiana 70801

Thomas N. Todd, Esq.
1 North LaSalle Street
Suite 2250
Chicago, Illinois 60602

State of Louisiana
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

(Seal)
WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

August 11, 1989

Mr. John N. Kennedy
Special Counsel to the Governor
c-o Governor's Office
State Capitol
Baton Rouge, Louisiana 70804

Re: United States of America v. Louisiana
United States District Court
for the Eastern District of Louisiana
Civil Action #80-3300

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Dear John:

You have done an outstanding job in assisting in the representation of the State of Louisiana in this most important suit involving higher education.

You may be sure that this work is appreciated by everyone.

As you know, in the latter part of last year, you signed on our brief as Special Counsel to the Governor, and I filed motions having you entered as Counsel of Record in the case. On your request, we also filed motions entering as Counsel of Record Joseph J. Levin and Carla Calobrisi.

We have reached a point in the case where it is important that we do not have confusion with regard to the representation of the State of Louisiana. I am most happy to have you continue as Attorney of Record in these proceedings with the understanding that you may file such pleadings as you or Mr. Levin or Ms. Calobrisi see fit on behalf of the Governor as amicus or otherwise. It should be noted that the Governor is not a party to the suit.

However, the Attorney General and only the Attorney General will file pleadings on behalf of the State of Louisiana as its official legal spokesman.

John, we want to work together as much as possible on this, and I look forward to doing so. This case is of monumental importance to the State and its people, and I know that everything you have done has been done by you with the intent to do what is best for the State.

As I see my duty, it is to support the Constitution of the State and to defend the State against liability in this case until that Constitution has been changed by a judgment of the U.S. Supreme Court or by a vote of the people. I also think it important to prevent the unnecessary merger of LSU and Southern University Law Schools.

I hope that understanding these parameters, we may continue to work together in the best interest of the State.

Yours very truly,

/s/ Billy
WILLIAM J. GUSTE, JR.
Attorney General

WJG, Jr-sl
cc: Honorable Buddy Roemer
Mr. Joseph J. Levin
Ms. Carla Calobrisi

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State of Louisiana
DEPARTMENT OF JUSTICE

(Seal) 7TH FLOOR
WILLIAM J. GUSTE. JR. 9-9-4 LOYOLA-BUILDING
ATTORNEY GENERAL NEW ORLEANS, 70112-8098

August 11, 1989

Mr. Joseph J. Levin
Ms. Carla Calobrisi
200 M Street, N.W.
Washington, D.C. 20036-3307

Re: United States of America v. Louisiana
United States District Court for the
Eastern District of Louisiana
Civil Action #80-3300

---

Dear Mr. Levin and Ms. Calobrisi:

Please see the attached letter which I have addressed this day to John Kennedy, Special Counsel to the Governor.

You may be sure that the State is grateful to you for the role you have played in the above referred to suit.

As I pointed out in my letter to Mr. Kennedy, it is imperative that we not have confusion in who represents the State of Louisiana at this point.

I am most happy to have you continue as Attorneys of Record in these proceedings with the understanding that you may file such pleadings as you see fit on behalf of the Governor as amicus or otherwise. It should be noted that the Governor is not a party to the suit.

However, the Attorney General and only the Attorney General will file pleadings on behalf of the State of Louisiana as its official legal spokesman.

Yours very truly,

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.

WJG, Jr/sl

Enclosure

| | |
|---|---|
| STATE OF LOUISIANA, *EX REL*, WILLIAM J. GUSTE, JR., ATTORNEY GENERAL | CIVIL DISTRICT COURT |
| VERSUS | PARISH OF ORLEANS |
| CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN, JR., & CARLA CALOBRISI | STATE OF LOUISIANA |
| DOCKET NO:_____ | FILED:_____ |

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

NOW INTO COURT comes plaintiff, the sovereign STATE OF LOUISIANA, through its chief legal officer, Attorney General WILLIAM J. GUSTE, JR., who respectfully represents:

1.

Made defendants herein are:

(1) the Honorable CHARLES E. "BUDDY" ROEMER, III, Governor of the State of Louisiana, whose domicile is located in the Parish of East Baton Rouge;

(2) JOHN N. KENNEDY, Special Counsel to the Governor, whose domicile is located in the Parish of Orleans;

(3) JOSEPH LEVIN, JR., a non-resident attorney at law employed by ROEMER, who may be served at the Office of the Governor, Louisiana State Capitol, Fourth Flour, Baton Rouge, Louisiana.

(4) CARLA CALOBRISI, a non-resident attorney at law employed by ROEMER, who may also be served at the Office of the Governor at the Louisiana State Capitol in Baton Rouge, Louisiana.

2.

Plaintiff, STATE OF LOUISIANA, has an inherent and sovereign right and interest in the legal enforcement of its Constitution.

3.

In particular, the State of Louisiana has an inherent and sovereign right and interest in the immutability of the constitutional polity for the administration and management of colleges and universities, adopted by the people of the State of Louisiana in 1974 in Article VIII, Sec. 5, 6 and 7 of the Louisiana Constitution (1974).

4.

The Attorney General is sworn by oath of office to uphold and protect from abrogation the popular sovereignty manifest and embodied in the Louisiana Constitution of 1974.

5.

This duty to preserve and protect the constitutional regime adopted by the people extends to all legal affairs in which the Constitution and general state law invest the

State with a right and interest, including all litigation in the state and federal courts.

6.

The fundamental duty of the Attorney General to uphold and enforce the Constitution and laws of the State of Louisiana is constitutionally enabled by the official status and powers incidental thereto granted by La. Const. Art. IV, Sec. 8 (1974), which provides in pertinent part:

> "There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. . . .
>
> As necessary for the assertion of protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supercede any attorney representing the state in any civil or criminal action.
>
> The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law."

"Chief legal officer," a title not provided by the 1921 Constitution but added to the 1974 Constitution, nominates the Attorney General as the constitutional officer with ultimate authority over the legal affairs of the State,

and over the attorneys representing the State in the conduct of those affairs.

7.

Attorneys who are not authorized by the Constitution or statutes of the State to legally represent the State in civil actions and proceedings are subject to the plenary authority of its chief legal officer. Accordingly, under Art. IV, Sec. 8, the Attorney General has the unconditional and plenary power to remove or rescind the legal authority to represent the State from any attorney employed by the State, who does not enjoy an independent right to do so granted expressly by the Constitution.

8.

La. Const. Art. IV, Sec. 5, and the La. Revised Statutes do not vest the governor with express or implied power and authority to legally represent the State in any civil or criminal action or proceeding. That power and authority is constitutionally vested exclusively in the Attorney General as chief legal officer and in the attorneys who are subject to his authority as chief legal officer.

9.

Defendants LEVIN and CALOBRISI were originally employed by contract after the July 19, 1989 federal court judgment to provide legal services in *United States of America v. Louisiana*, a federal desegregation suit involving Louisiana colleges and universities. Their contract has

expired, and there is no constitutional provision authorizing the Governor to employ them as legal representatives of the State in any civil proceeding nor any statute providing such putative authority to ROEMER, LEVIN or CALOBRISI.

10.

Notwithstanding this absence of legal authority, defendants KENNEDY, LEVIN AND CALOBRISI, acting as legal counsel for defendant ROEMER and pursuant to ROEMER's direction, have illegally purported to act as the legal representative and attorney for the State of Louisiana in several different civil actions and proceedings in which the State of Louisiana is a party. This knowing and intentional violation of the Louisiana Constitution is particularly egregious because the Attorney General is also counsel of record for the State of Louisiana in these civil actions and proceedings.

11.

Defendants ROEMER and KENNEDY have stated that the Governor intends, through his special counsel, to continue to illegally enroll and intervene as counsel of record and the putatively authorized legal representative of the State of Louisiana in federal and state civil proceedings in which the State has been made a party.

12.

These acts by ROEMER, KENNEDY, LEVIN AND CALOBRISI are an unconstitutional usurpation and

infringement of the power and authority expressly vested in the Attorney General as chief legal officer by Art. IV, Sec. 8 of the Louisiana Constitution of 1974. These acts by ROEMER, KENNEDY, LEVIN AND CALOBRISI are unlawful and *ultra vires*.

13.

In particular, ROEMER, KENNEDY, LEVIN AND CALOBRISI have violated the Constitution by their illegal attempt to represent the State in the federal desegregation suit against the State of Louisiana and its colleges and universities, *United States of America v. Louisiana*, Civil Action No. 80-3300 upon the docket of the United states District Court for the Eastern District of Louisiana.

14.

On January 20, 1989, the Attorney General as an accommodation to the Governor, granted KENNEDY'S request that Kennedy be allowed to enroll as co-counsel for the State of Louisiana in these proceedings with the Attorney General, who had served as counsel of record in the desegregation lawsuit since 1974. LEVIN and CALOBRISI were allowed to also enroll on the motion of the Attorney General shortly after KENNEDY became co-counsel of record. They were selected and employed by Governor ROEMER. *See* Affidavit of Winston DeCuir, Exhibit "A" attached.

15.

KENNEDY, LEVIN and CALOBRISI had (and have) no constitutional authority to represent the State of Louisiana in this civil proceeding, and no legal right to enroll on their own motion. Their entitlement to represent the State was derived solely from the authorization of the Attorney General. KENNEDY, LEVIN and CALOBRISI were enrolled as counsel by motion of the Attorney General. (Motions to Enroll attached hereto, made part hereof, and marked Exhibit "B".)

16.

On July 19, 1989, the federal court rendered judgment, finding that the principal cause of the lingering vestiges of *de jure* segregation was the constitutional structure for governance of higher education. The court held that the Board of Regents and the three management boards established by La. Const. Art. VIII, Sec. 5, 6, 7, 8 perpetuated a dual educational system, and judicially nullified and delegitimated those provisions of the Louisiana Constitution instituted by the people of Louisiana in 1974. The federal court then, *ex proprio motu*, judicially created a single board to govern higher education in Louisiana and ordered its implementation by the State.

17.

Governor ROEMER chose to support the federal court's order to create a single board. The Attorney General discerned his duty to be to uphold and preserve the Louisiana Constitution, until and unless the United States

Supreme Court ruled that the constitutional polity for governing and administering higher education established by La. Const. Art. VIII, Sec. 5, 6, 7, 8 (1974) was in fact in conflict with the United States Constitution and that the remedy fashioned by the federal district court was legally correct.

18.

The Attorney General sought a stay order and judicial review of the federal district court's decree, on behalf of the State of Louisiana, in the United States Supreme Court. *On behalf of the State of Louisiana,* acting on ROEMER'S instruction, KENNEDY opposed the application for judicial review and sought to defeat it.

19.

On August 11, 1989, the Attorney General wrote to KENNEDY, LEVIN and CALOBRISI and withdrew, pursuant to his plenary authority, all delegated authority for KENNEDY, LEVIN and CALOBRISI to continue to act as an authorized legal representative of the State of Louisiana. Nonetheless, at ROEMER'S direction, KENNEDY, LEVIN and CALOBRISI have continued to do so, appearing in the continuing federal desegregation suit. (A copy of the August 11, 1989 letters from the Attorney General to KENNEDY, LEVIN and CALOBRISI removing them as attorneys for the State is attached hereto, made part hereof and marked Exhibit "C" and "D" for identification.)

20.

From January 20, 1989 until August 11, 1989, defendant KENNEDY, LEVIN and CALOBRISI lawfully represented the State of Louisiana in the desegregation case by reason of the permission of the Attorney General. Since August 11, 1989 until present, KENNEDY, LEVIN and CALOBRISI have no lawful authority to represent the State, and their real client in interest has been Governor ROEMER. During this time, They have acted to facilitate and support and defend the federal court's decision, and thus to aid the judicial nullification of the Louisiana Constitution, which is materially adverse to the rights and interests of their former client, the State of Louisiana.

21.

Plaintiff STATE OF LOUISIANA is entitled to declaratory judgment: (1) declaring the sovereign right and interest of the State of Louisiana to the legal viability of its Constitution and to the full and good faith legal defense of the constitutionality of those provisions of the Louisiana Constitution, Art. VIII, declared invalid by the federal district court in *USA v. Louisiana;* and (2) declaring it to be unconstitutional for governor ROEMER or his special counsel KENNEDY or LEVIN or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representative of the State of Louisiana in any civil or criminal proceeding, and (3) declaring that KENNEDY, LEVIN and CALOBRISI'S purported representation of the State of Louisiana in *USA v. Louisiana* is not authorized in law, is *ultra vires,* and is unconstitutional, from the date of their termination as

attorney for the State by the Attorney General until the present day, and therefore is legally null and void as of August 11, 1989.

22.

Plaintiff STATE OF LOUISIANA is entitled to a preliminary injunction, and thereafter to a permanent injunction: Restraining, enjoining and prohibiting ROEMER and KENNEDY, LEVIN and CALOBRISI from acting, purporting to act or identifying themselves as the lawfully authorized legal representatives of the State of Louisiana in any civil or criminal action or proceeding in either state or federal court, and in particular enjoining to act and identify themselves as the legal representatives of the State of Louisiana in *USA v. Louisiana*, No. 80-3300 on the docket of the United States District Court for the Eastern District of Louisiana, by reason of their violation and infringement of La. Const. Art. IV, Sec. 8 (1974) and R.S. 49:257B.

WHEREFORE, THE STATE OF LOUISIANA PRAYS:

1. That the furnishing of bond be dispensed with pursuant to R.S. 13:5036:

2. That the Honorable CHARLES E. "BUDDY" ROEMER, III, Governor of the State of Louisiana, and JOHN N. KENNEDY, Special Counsel to the Governor, and JOSEPH LEVIN, JR. and CARLA CALOBRISI, be served with these proceedings and duly cited, and that they be duly ordered to show cause on the date and time to be fixed by this court why a preliminary injunction should not issue restraining, enjoining, and prohibiting

ROEMER, KENNEDY, LEVIN and CALOBRISI from acting, purporting to act, or identifying themselves as the lawfully authorized legal representatives of the State of Louisiana in any civil or criminal action or proceeding in either state or federal court, and in particular enjoining and restraining ROEMER, KENNEDY, LEVIN and CALOBRISI from continuing to act and identify themselves as the legal representatives of the State of Louisiana in *USA v. Louisiana*, No. 80-3300 on the docket of the United States District Court for the Eastern District of Louisiana, by reason of their violation and infringement of La. Const. Art. IV, Sec. 8 (1974) and enabling legislation.

3. That upon trial on the merits, that judgment be rendered in favor of the STATE OF LOUISIANA, decreeing the above described acts to be a violation of the Constitution and statutes of Louisiana, perpetuating the said preliminary writ of injunction and making it permanent in the form and substance of the preliminary injunction; and

4. That the court render judgment in favor of the STATE of LOUISIANA declaring: (1) that the STATE OF LOUISIANA has an inherent and sovereign right and interest in the legal subsistence and efficacy of its constitution as a whole, and to a full and good faith legal defense of the constitutionality of those provisions of the Louisiana Constitution declared invalid by the federal district court in *USA v. Louisiana;* and (2) that it is unconstitutional under La. Const. Art. IV, Sec. 8 (1974) for Governor ROEMER or his special counsel KENNEDY or LEVIN or CALOBRISI to act or purport to act or identify themselves as the lawfully authorized legal representatives of the State of Louisiana in *any* civil or criminal

action or proceeding; and (3) that KENNEDY, LEVIN and CALOBRISI'S purported representation of the State of Louisiana in *USA v. Louisiana* was not authorized in law, was *ultra vires* and was unconstitutional, from the date of their lawful termination as attorneys for the State of Louisiana on August 11, 1989 until the present day, and that therefore all acts and statements by KENNEDY, LEVIN and CALOBRISI as a putative legal representative of the State during this period were null and void *ab initio*.

5. For full, general and equitable relief.

Respectfully submitted,

---

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
LSBA Bar Roll No. 2248

KENNETH C. DEJEAN
First Assistant Attorney General

WINSTON W. RIDDICK
Executive Assistant
Attorney General

JESSE J. MARKS
Assistant Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

CHARLES J. YEAGER
Assistant Attorney General

DALE C. WILKS
Assistant Attorney General

PAUL R. BAIER
Special Assistant
Attorney General

Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
(504) 342-7013

Attorneys for the State of Louisiana

| | |
|---|---|
| STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL | CIVIL DISTRICT COURT |
| VERSUS | PARISH OF ORLEANS |
| CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN, JR., & CARLA CALOBRISI | STATE OF LOUISIANA |

AFFIDAVIT OF VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared DALE C. WILKS, who being duly sworn did depose and say:

That he is duly commissioned Assistant Attorney General and by law is an authorized legal representative for plaintiff, the State of Louisiana, and is counsel of record for plaintiff herein, and that all allegations of fact in the foregoing petition for declaratory judgment and injunctive relief are true and correct to the best of his information, knowledge and belief.

Witnesses:

_____

_____

_____

DALE C. WILKS
Assistant Attorney General
La. Department of Justice
123 Loyola Building
New Orleans, LA 70112
(504) 342-7013

SWORN TO AND SUBSCRIBED before the undersigned Notary Public this ___ day of ___, 1990 in New Orleans, Louisiana.

NOTARY PUBLIC

| | |
|---|---|
| STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL | CIVIL DISTRICT COURT |
| VERSUS | PARISH OF ORLEANS |
| CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN, JR., & CARLA CALOBRISI | STATE OF LOUISIANA |

ORDER

Considering the verified petition filed herein:

IT IS ORDERED that the defendants, Governor Buddy Roemer, John N. Kennedy, Joseph Levin, Jr., and Carla Calobrisi, show cause on the ___ day of ___, 1990, beginning at ___ ___.m., why a preliminary writ of injunction, in the form and substance prayed for in the petition, should not be issued herein.

THUS DONE, READ AND SIGNED in Chambers at New Orleans, Louisiana on this ___ day of ___, 1990.

JUDGE
Orleans Civil District Court

Service Instructions:

1. Charles E. "Buddy" Roemer, III, may be served either at the Governor's Mansion in Baton Rouge, Louisiana, or in his office on the 4th Floor of the State Capitol Building in Baton Rouge, Louisiana.

2. John N. Kennedy, Special Counsel to the Governor, may be served at his domicile at 1147 Constantinople Street, New Orleans, Louisiana, during the evening hours or on weekends.

3. Request Dale C. Wilks to serve defendants, Joseph Levin, Jr. and Carla Calobrisi, in accordance with procedure set forth in R.S. 13:3204 and R.S. 13:3201 *et seq.*, generally, the Louisiana "Long Arm Statute." Their last known address is 2000 M Street, NW, Washington, D.C. 20036-3307.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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|---|---|
| STATE OF LOUISIANA *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,<br>Plaintiff,<br>v.<br>CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N. KENNEDY, JOSEPH LEVIN JR. AND CARLA CALOBRISI,<br>Defendants. | Civil Action No. 90-4109<br>SECT.K MAG.4<br>FILED<br>OCT 12, 1990 |

NOTICE OF REMOVAL OF CASE
PURSUANT TO 28 U.S.C. SEC. 1441

To the Judges of the United States District Court for the Eastern District of Louisiana:

Petitioners Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin Jr., and Carla Calobrisi (hereinafter collectively "Petitioners" or "Defendants"), respectively state:

1. On or about October 9, 1990, an action was commenced against Defendants in the Louisiana Civil District Court for Orleans Parish entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr. and Carla Calobrisi*, case number 90-19640, Division H. A copy of the Petition for Declaratory Relief and Injunctive Relief and the Service Instructions is attached hereto as Exhibit A.

On information and belief, no further pleadings have been served or filed in the state court.

2. This Notice for Removal is filed within the time limits prescribed by 28 U.S.C. Sec. 1446(b).

3. A copy of this Notice for Removal has been delivered to the Clerk of the Louisiana Civil District Court for Orleans Parish, pursuant to 28 U.S.C. Sec. 1446(d).

4. The above-described action is a civil action in which this Court has original jurisdiction under the provisions of 28 U.S.C. Sec. 1331 and is one which may be removed to this Court by the Petitioners, pursuant to 28 U.S.C. Sec. 1441 *et seq.*, in that it is a civil action brought under several sources of federal law.

5. First, federal case law provides, under circumstances such as exist here, that a state's governor is the proper representative of the state in litigation to which the state is a party. *See, e.g., Graddick v. Newman*, 453 U.S. 928 (1981); *Williams v. McKeithen*, No. 71-98-B (M.D. La. July 20, 1990).

6. The Local Rules for the United States District Court for the Eastern District Court for the Eastern District of Louisiana ("Local Rules") give this Court specific jurisdiction over determinations of who may appear in the Eastern District. *See* Local Rule 20. Those Rules, promulgated "in accordance with Rule 83 of the Federal Rules of Civil Procedure," Preamble to Local Rules, outline the requirements for practice before the Court, as well as provide the Court with jurisdiction over disciplinary action against attorneys practicing before it. *See* Local Rule 20; Rules of Disciplinary Enforcement of the United

States District Court for the Eastern District of Louisiana, Rule II (Appendix to Local Rules). It is apparent from the face of the Attorney General's Petition that he is seeking a determination and an injunction by the Louisiana Civil District Court that Petitioners may not appear in *United States v. Louisiana*, a case currently pending before this Court. Such a request is properly addressed to the federal court possessing jurisdiction over *United States v. Louisiana*. Moreover, the Attorney General's Petition essentially seeks a determination and an injunction by a state court as to who represents the State of Louisiana in the federal court; according discussed above, federal courts possess jurisdiction over such matters.

7. Mr. Guste's Petition may also be seen as a thinly-veiled attempt to pursuade a state court to issue an injunction that would have the effect of enjoining a federal court from proceeding with a matter remanded to it by the United States Court of Appeals for the Fifth Circuit. Because the Fifth Circuit has placed the issue of the State's representation before the United States District Court, indicating that this Court does indeed have jurisdiction over this matter and is the proper forum for such a determination, the Attorney General should not be permitted to seek injunctive and declaratory relief from a state court whose determination of the issue, if contrary to that of the federal court, would serve to order the federal court to act contrary to its own decision in the matter.

8. Title 28, Section 1441(c) of the United States Code provides further grounds for granting the instant Notice of Remove, where that Section provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein . . .

28 U.S.C. Sec. 1441(c). Should this Court determine that part of Mr. Guste's Petition seeks a determination of state law, the Petitioners herein submit that, at the very least, one part of the Attorney General's Petition is a direct request for a determination arising under federal law. As the Attorney General states, his request for relief seeks an injunction:

> enjoining and prohibiting ROEMER and KENNEDY, LEVIN and CALOBRISI from acting . . . as the lawfully authorized legal representatives of the State of Louisiana . . . , and *in particular* enjoining to act and identify [*sic*] themselves as the legal representatives of the State of Louisiana in *USA v. Louisiana*, No. 80-3300. . . .

Petition for Declaratory and Injunctive Relief at 7-8 (emphasis supplied). The Attorney General seeks a determination of who may practice before this Court and who may represent a litigant in the federal case. This is a matter for determination by this Court and certainly provides federal jurisdiction, sufficient for removal of that issue, as well as any other issue set forth in Mr. Guste's petition, but not otherwise removable.

WHEREFORE, Petitioners pray that this action be removed to this Court, this Court accept jurisdiction of this action and this action be placed on the docket of this

Court for further proceedings as though this action had originally been instituted in this Court.

Respectfully submitted,

/s/ Charles E. "Buddy" Roemer, III by Jnk
Charles E. "Buddy" Roemer, III,
Governor of the State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ John N. Kennedy
John N. Kennedy
Special Counsel to the Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ Joseph J. Levin, Jr. by Jnk
Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/ Carla Calobrisi by Jnk
Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 12, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>STATE OF LOUISIANA, *ET AL.*<br>Defendants. | Civil Action No. 80-3300 Section "A" |
| STATE OF LOUISIANA, *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,<br>Plaintiff,<br>v.<br>CHARLES E. "BUDDY" ROEMER, III, GOVERNOR, JOHN N, KENNEDY, JOSEPH LEVIN, JR. AND CARLA CALOBRISI,<br>Defendants. | Civil Action No. 90-4109 Section "A" |

MEMORANDUM IN OPPOSITION TO MOTION FOR REMAND, NULLIFICATION OF REMOVAL, COSTS, EXPENSES, AND ATTORNEYS' FEES, AND IMPOSITION UPON DEFENDANTS OF SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants, Charles E. "Buddy" Roemer, III, Governor of the State of Louisiana, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi (hereinafter collectively "Defendants"), respectfully submit this Memorandum in opposition to Motion for Remand, Nullification of

Removal, Costs, Expenses, and Attorneys' Fees, and Imposition upon Defendants of Sanctions under Rule 11 of the Federal Rules of Civil Procedure, filed by Plaintiff Attorney General William J. Guste, Jr. ("Motion for Remand").

## I. INTRODUCTION

Given the expedited nature of the Attorney General's Motion for Remand, the Defendants in this case have not had the opportunity to analyze thoroughly the Attorney General's allegations, but instead submit the following brief analysis of the pertinent issues presented in the Motion for Remand.

## II. BACKGROUND

Civil Action Number 80-3300, *United States v. Louisiana*, has been pending in this and other federal courts since 1974. One of the primary issues currently being litigated is whether the Attorney General or the Governor properly represents the State of Louisiana in this federal court litigation to which the State is a party. The action entitled *State of Louisiana ex rel. William J. Guste, Jr. v. Charles E. "Buddy" Roemer, III, Governor, John N. Kennedy, Joseph Levin, Jr. and Carla Calobrisi*, was commenced on or about October 9, 1990, in the Louisiana Civil District Court for Orleans Parish. The sole question posed by the Attorney General's Petition for Declaratory Judgment and Injunctive Relief is whether the Governor or the Attorney General is the proper representative of the State of Louisiana in this federal court litigation to which the State is a party. The same question of law and fact is

pending before this Court in Civil Action Number 80-3300, *United States v. Louisiana*. On October 12, 1990, Defendants filed a Notice of Removal of Case, pursuant to 28 U.S.C. Section 1441, and a Motion to Transfer and Consolidate the action with Civil Action Number 80-3300, Section "A", *United States v. Louisiana*. The Court consolidated the two actions on October 19, 1990.

## III. THIS COURT POSSESSES JURISDICTION OVER THE REMOVED ACTION

As set forth in the Notice of Removal, this Court possesses original jurisdiction over the removed action pursuant to 28 U.S.C. Section 1331, which provides that the district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. It is not necessary for the Court to address issues of state law. As such, the Court may assert jurisdiction based on several sources of federal law, each sufficient to defeat the Attorney General's attempt to remand. First, federal common law provides this Court with jurisdiction over the subject matter at issue in the removed action. Applying the common meaning of the word "law," the Supreme Court has concluded that Section 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory or constitutional origin. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 n.5 (1959). Federal common law provides, under circumstances such as exist here, that a federal court may indeed decide that a state's governor is the proper representative of the state in litigation to which the state is a party. *See, e.g., Graddick v.*

*Newman*, 453 U.S. 928 (1981); *Williams v. McKeithen*, No. 71-98-B (M.D. La. July 20, 1990). As the Attorney General is well aware, *Graddick* and *Williams* have been cited by Defendants in this and other litigation to show that federal courts have indeed made determinations such as the one at issue without resorting to state law. For purposes of determining federal question jurisdiction, the value of *Graddick* and *Williams* lies as much in the willingness of the courts to render decisions on this subject as in the substance of the courts' decisions themselves. These sources, in addition to those discussed in Defendants' Notice of Removal, provide the Court with more than adequate jurisdiction in this action. *See* Notice of Removal at 2-3.

Despite the Attorney General's assertion that his petition presents only state issues, it was Mr. Guste who brought these very issues before the United States Supreme Court in his Motion to Supersede Counsel For State of Louisiana and to Strike Response in Opposition to the State's Motion for a Stay Addressed to Individual Justice. Placing the question of who represents the State before the highest federal court, Mr. Guste should not now be allowed to disclaim the jurisdiction of this federal court over the very same issue. Indeed, the Attorney General has admitted that this Court is empowered with authority to determine who may practice before it, having asked this Court to issue an order accepting his designation of counsel for the State of Louisiana, as provided in his Motion to Designate Counsel for the State and Withdraw Designation of Additional Counsel.

If anything, Mr. Guste has made this even more of a federal question by seeking injunctive relief from a state

court as to determinations eminating from a federal court. While Congress has authorized courts of the United States to restrain state court proceedings in special circumstances, state courts are completely without power to restrain federal court proceedings. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977). *See Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964); *Meridian Investing & Development Corp. v. Suncoast Highland Corp.*, 628 F.2d 370, 372 (5th Cir. 1980). This well-established rule is in no way relaxed because the prohibition is addressed to the parties rather than the federal court itself. *Felter*, 434 U.S. at 17. *See Donovan*, 377 U.S. at 413. The Attorney General's petition, though not addressed directly to this Court, constitutes a poorly disguised attempt to enjoin this Court from proceeding with a matter remanded to it by the Fifth Circuit. Such an attempt should not be allowed.

## IV. CONCLUSION

Federal question jurisdiction clearly appears on the face of the Attorney General's petition, and thus, remand is inappropriate in this case. Mr. Gustee's Motion to Remand, spiked with *ad hominem* allegations of improper actions on the part of the Governor of Louisiana and counsel for the State, may be viewed simply as a manipulative attempt to interfere with this Court's proceedings. Such tactics have been repudiated by the Supreme Court and should be rejected be this Court as well. *See Carnegie-Mellon University v. Cohill*, ___ U.S. ___, 108 S.Ct. 614, 622 (1988). Finally, the Attorney General's motion for sanctions under Rule 11 is even less meritorious than his removal argument and should, therefore, be denied.

Respectfully submitted,

/s/ Charles E. "Buddy" Roemer, III,
Charles E. "Buddy" Roemer, III,
Governor of the
State of Louisiana
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ Joseph J. Levin, Jr.
Joseph J. Levin, Jr.
1025 Thomas Jefferson St., N.W.
Suite 500 East
Washington, D.C. 20007
(202) 342-5400

/s/ John N. Kennedy
John N. Kennedy
Special Counsel to the
Governor
Office of the Governor
P.O. Box 94004
State Capitol, 4th Floor
Baton Rouge, Louisiana 70804
(504) 342-7015

/s/ Carla Calobrisi
Carla Calobrisi
1146 19th Street, N.W.
3rd Floor
Washington, D.C. 20036
(202) 857-0242

Dated: October 26, 1990